

DOCUMENT RESUME

ED 166 282

UD 018 866

AUTHOR Cebulski, Bonnie G.
 TITLE Affirmative Action Versus Seniority--Is Conflict Inevitable? Monograph of the California Public Employee Relations Program.
 INSTITUTION California Univ., Berkeley. Inst. of Industrial Relations.
 PUB DATE 77
 NOTE 58p.; Not available in hard copy due to institution's restriction
 AVAILABLE FROM CPER, Institute of Industrial Relations, University of California, Berkeley, California 94720 (\$5.00)
 EDRS PRICE MF-\$0.83 Plus Postage. HC Not Available from EDRS.
 DESCRIPTORS *Affirmative Action; Budgets; *Civil Rights; *Equal Opportunities (Jobs); *Federal Legislation; Job Layoff; Minority Groups; Public Education; *Reduction in Force; *Seniority
 IDENTIFIERS *California

ABSTRACT

In this monograph, the Federal equal employment opportunity law (the legislation and litigation on the seniority conflict) and the nature of seniority rights in the public sector are examined. The concept of affirmative action is discussed with reference to legislation and national policy and the interrelationship of affirmative action to layoffs by seniority. Distinctions between the nature of seniority principles and policies in the private sector and the public sector are outlined. Case law on issues of seniority and affirmative action in both sectors is detailed. Each of the major cases on the issue is critiqued. A case study of layoffs in the public sector in California is presented, with particular attention given to minority layoffs. Recommendations are made concerning alternatives by which public employers and employee organizations might meet the need to reconcile the dual pressures for budgetary restraint and for exemplary and fair employment practices for both career employees and minority entrants into the work force. (Author/WI)

 * Reproductions supplied by EDRS are the best that can be made *
 * from the original document. *

ED166282

Affirmative Action Versus Seniority —Is Conflict Inevitable?

By

BONNIE G. CEBULSKI, J.D.

Edited by B. V. H. Schneider

"PERMISSION TO REPRODUCE THIS
MATERIAL IN MICROFICHE ONLY
HAS BEEN GRANTED BY

Bonnie G. Bogue
Inst. Indus. Relations

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC) AND
USERS OF THE ERIC SYSTEM."

Institute of Industrial Relations
University of California • Berkeley
Lloyd Ulman, *Director*
1977

U.S. DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRO-
DUCED EXACTLY AS RECEIVED FROM
THE PERSON OR ORGANIZATION ORIGIN-
ATING IT. POINTS OF VIEW OR OPINIONS
STATED DO NOT NECESSARILY REPRESENT
OFFICIAL NATIONAL INSTITUTE OF
EDUCATION POSITION OR POLICY.

UD018866

© Copyright, 1977, by the Regents of the University of California

Monographs of the California Public Employee Relations Program of the
Institute of Industrial Relations

Local Option in the Administration of Public Sector Employment Relations: California Experience and Prospects by Philip Tamoush. 1977. \$5

Affirmative Action Versus Seniority—Is Conflict Inevitable? by Bonnie G. Cebulski, J.D. 1977. \$5

Cost-of-Living Escalators in the Public Sector by Marla Taylor. 1977. \$5

(The CPER Monograph Series is partially funded under contract from the State of California Agriculture and Services Agency through a grant from the U.S. Civil Service Commission under the Intergovernmental Personnel Act [P.L. 91-648]. The findings, opinions, and conclusions presented therein are those of the authors and not necessarily those of the State, Commission, or Institute.)

Quantity discounts available

Order from

CPER, Institute of Industrial Relations, University of California,
Berkeley, CA 94720

Acknowledgments

The cooperation and interest of persons involved in the front line of this vital conflict made the following monograph possible. I express my appreciation to the many who granted interviews and provided information, documentation, and insights into the dynamics of the seniority-affirmative action dilemma, particularly to those California practitioners whose participation led to the case study on the California experience.

Special appreciation is due several people who took time from their own pursuits to read the initial draft and make significant contributions to its content and clarity. I particularly wish to acknowledge the invaluable assistance of Jules Gordon, San Francisco Regional Office of the General Counsel, EEOC. I am also indebted to Professors Marion Ross, Mills College, and Joseph Grodin, Hastings College of the Law, for their perceptive comments and suggestions.

One person, who has been assisting the research and learning pursuits of countless faculty members, students, and practitioners for 29 years, must be singled out for special thanks. Gwendolyn Lloyd, Librarian at the Institute of Industrial Relations, University of California, Berkeley, who will retire this year, provided me with unflagging assistance, demonstrating the uncommon abilities that have earned her a deserved national reputation as an outstanding industrial relations librarian.

Credit is seldom given to the invisible assistance of members of an organization which produces a program such as this one. E.V.H. Schneider, Director of the California Public Employee Relations Program, was a driving force behind this monograph, as well as the editor whose skill greatly improved the author's best efforts. Thanks are also due to all the CPER staff who provided assistance in innumerable ways.

BONNIE G. CEBULSKI, J.D.

Foreword

The CPER Program of the Institute of Industrial Relations, U.C.—Berkeley, was created in 1969 for the purpose of providing nonadversary educational materials to those involved in employer-employee relations in California public employment. The *CPER* journal-information service publishes up-to-date, practical information for public sector practitioners at all levels of government. These periodicals are also widely used by attorneys, academicians, students, and specialists in other states. The Institute's interest in the public sector extends, in addition, to direct training, and programs are given regularly on a variety of subjects of current interest. A contract from the State Agriculture and Services Agency under the Intergovernmental Personnel Act made it possible to expand Institute services to the public sector, plus issue three monographs.

The Institute is pleased to offer *Affirmative Action Versus Seniority—Is Conflict Inevitable?* as the second in its Monograph Series. Equal employment opportunity laws have begun to produce long-sought gains for minority groups and women. However, advances have recently been jeopardized generally by economic conditions and in particular by layoffs. Historically, the seniority principle has governed layoffs; today, the operation of a seniority system can rob an affirmative action plan of its impact by eliminating all recent hires. The author reviews equal employment opportunity law and landmark litigation on the seniority problem and examines the practical experience of some public sector employers faced with the affirmative action-seniority issue. The result is an invaluable tool for employers and employee organizations who need a guide to their legal obligations. Perhaps even more important are the final chapters which indicate some methods by which equity might be achieved without sacrificing public policy goals or the seniority principle.

Bonnie G. Cebulski is particularly qualified to describe and analyze these problems. She holds a J.D. from the University of California at Berkeley and has written articles on a wide variety of public employment and labor law issues. As Associate Director of the California Public Employee Relations Program, she has acquired a national reputation for her ability to relate complex legal and policy issues to the pragmatic needs of management and labor practitioners.

B. V. H. SCHNEIDER
CPER Program Director

Table of Contents

I. Introduction	1
II. The Law and the Problems	3
Affirmative Action	
Layoffs and Seniority	
The Case Study: California	
III. Seniority in the Public Sector	9
Seniority and the Merit System	
Influence From the Private Sector	
Seniority and the Growth of Public Sector	
Collective Bargaining	
IV. Seniority and the Courts: Private Sector	15
Early 'Departmental Seniority' Cases	
Cases on Employment Seniority and Layoffs	
Supreme Court Seniority Decisions	
Summary of the Case Law	
EEOC and the Seniority Issue	
V. Layoff-Seniority Cases in the Public Sector	31
Layoffs By Racial Quota: New York	
Constructive Seniority for Female Police	
Officers: New York	
Seniority Versus Court-Ordered Integration: Detroit	
VI. The California Experience: A Case Study	37
10 California Jurisdictions	
Layoffs Without Reductions	
Impact of Layoffs on Minority Employees	
Alteration of Layoff Rules	
Union Attitudes Toward the Seniority-Equal	
Opportunity Conflict	
Seniority Conflicts With Affirmative Action Plans	
Political Effects of Minority Layoffs	
VII. Alternatives to Conflict	47
VIII. Conclusion: The Public Sector's Challenge	51

I.

Introduction

Can traditional seniority systems and effective affirmative action plans coexist? National attention has been focused on this question as layoffs by seniority have cut into recent employment gains of minority group members and women, particularly during the economic downturn of 1974 and 1975. Equal employment opportunity litigation has been dominated by the debate over whether seniority systems are legitimate under federal fair employment laws. While enforcement agencies, employers, employee organizations, and aggrieved individuals are searching for a judicial resolution of the conflict between seniority rights and affirmative action goals, they are also finding voluntary, often negotiated, solutions to the conflict as they seek to fulfill the equal opportunity duty imposed by Title VII of the Civil Rights Act of 1964 and other legislation.

The objective of this monograph is to examine federal equal employment opportunity law—the legislation and litigation on the seniority conflict—and the nature of seniority rights in the public sector in order to delineate the potential for conflict or for the avoidance of that conflict through innovation and planning by public sector employers and employee organizations.

Chapter II presents a three-part outline of material essential to an understanding of the issues. A discussion of the concept of affirmative action and its inception in legislation and national policy precedes a section setting forth the interrelationship of affirmative action and layoffs by seniority in an economic setting that has produced both layoffs and a heightened need for affirmative action for disadvantaged workers. A brief description follows of a case study, which will examine in Chapter VI some public sector reductions in force in California and provide the basis for conclusions on how potential affirmative action-seniority conflicts can be avoided.

Two chapters analyzing the case law are preceded by Chapter III, which highlights the nature of seniority principles in the public sector. Some distinctions are drawn between the public and private sectors in attitudes toward seniority and histories of such job security measures. This perspective on the seniority principle is important to an understanding of existing case law, as well as future application of the law.

Chapters IV and V provide a detailed look at the development of the case law on this explosive issue. Each of the major cases in the private sector is critiqued and the essential holdings distilled to clarify the evolution of the law and its effect on the application of the equal opportunity statute to employment practices. The second litigation chapter examines some leading public sector cases that apply the same legal principles to situations peculiar to layoffs in local government employment.

The California case study, presented in Chapter VI, illustrates some local government responses to layoffs and the potential conflict between seniority principles and affirmative action goals. The data provide a pragmatic, rather than legal or theoretical, examination of this critical dilemma of law and public policy.

The final two chapters integrate the insights gained from the material into suggestions for alternatives to conflict. They explore the means by which public employers and employee organizations might meet the need to reconcile the dual pressures for budgetary restraint and for exemplary and fair employment practices for both career employees and minority entrants into the work force.

II.

The Law and the Problems

The mandate for equal employment opportunity grew out of the constitutional principle of equal protection and took shape in Title VII of the Civil Rights Act of 1964,¹ as well as in other federal and state statutes and federal executive orders.² State and local government agencies became subject to most of the same legal requirements as private employers after the 1972 amendments to Title VII brought them into the purview of that act.

Affirmative Action

After the initial impact of Title VII on overt acts of employment discrimination, enforcement agencies turned their attention to encouragement of voluntary, remedial "affirmative action" to overcome not only the effects of overt discrimination but also covert or unintentional discrimination manifested in patterns of employment that had traditionally affected members of racial and ethnic minority groups and women.

Affirmative action is a remedial concept—an action by an employer to analyze and then correct its own recruitment, hiring, promotional, and other employment practices that appear to have had a disparate impact on the employment of persons protected by the act. These voluntary plans are intended to have the same remedial effect as judicial remedies imposed in discrimination suits, but the voluntary plans avoid the lengthy and costly task of proving in court that employment practices are in fact discriminatory.

Affirmative action plans were initiated by federal Executive Order 11246 as requirements for employers who wished to qualify for federal contracts.³ Affirmative action plans are not required by Title VII, the thrust of which is toward remedial action based on a judicial determination of the failure to provide equal opportunity. In fact, the act prohibits "preferential treatment" on the basis of race or sex except to remedy discriminatory patterns and practices. An affirmative action plan that gives preference to nonwhite or female persons without a showing (or the ability to show when challenged) that the employer has a history of prior discrimination may constitute unlawful preferential treatment. Two California public employment cases (both trial court decisions) have held that the City of Berkeley's affirmative action plan, which seeks to bring the percentage of minorities and women in each department to a level comparable to that in the city population, violates Title VII and the Constitution because the city had not previously discriminated.⁴ The California Supreme Court (in a case unrelated to employment) has noted that the law makes it clear that "it is unconstitutional reverse discrimination to grant a preference to a minority employee in the absence of a showing of prior discrimination by the particular employer granting the preference."⁵ The reverse discrimination issue remains to be fully litigated, and the question promises to be one of the most difficult in the equal opportunity field.

Evidence of disparate impact of employment practices on a protected class can raise a judicial presumption under Title VII that unlawful discriminatory practices may exist. For this reason, the federal Equal Employment Opportunity Commission (EEOC) encourages the adoption of voluntary affirmative action plans by employers to overcome underrepresentation or other signs of possible discriminatory impact against a protected class. Although the plans are voluntary, they are adopted in response to the legal duty imposed by Title VII to remedy the effects of what the commission terms "systematic" discrimination stemming from seemingly neutral practices or employment systems that perpetuate the effects of past discrimination.⁶

In its 1974 publication, *Affirmative Action and Equal Employment: A Guidebook for Employers*, the commission states:

The legal necessity for positive, affirmative action to remove these discriminatory practices which still pervade every phase of employment has been firmly established by the courts.

Many people who suffer effects of past and present discrimination are already qualified for better jobs, but continuing barriers throughout employment systems deny them equal opportunity. The major part of an Affirmative Action Program must be recognition and removal of these barriers, identification of persons unfairly excluded or held back and action enabling them to compete for jobs on an equal basis.

* * *

[The] Commission cannot guarantee that following [the basic steps set forth in] this guide will provide "immunity" from charges of discrimination which may be filed against you. However, if you undertake the affirmative actions recommended with the same commitment, efforts and monitoring applied to your other basic organizational goals, the resulting employment system should provide equal opportunity as required by law.⁷

Many employers have implemented voluntary affirmative action plans in response to this national policy. Others have been compelled to do so when courts have ordered designated remedial steps to be taken to eliminate effects of discriminatory practices — in some instances without a finding that the employer had intended to discriminate, but rather that he had utilized an employment practice which had a disproportionate effect on a protected class.⁸

Another major approach to remedying improper practices has been through conciliation agreements negotiated by the EEOC, the employer, and employee organizations, or by consent decrees approved by the court. The purpose of such negotiated resolutions is to obtain an enforceable agreement to correct objectionable practices and improve employment opportunities, but to avoid the costly litigation process necessary to prove that the employer has in fact unlawfully discriminated.⁹

In addition to these federal requirements, in California the Fair Employment Practice Act calls for voluntary affirmative action programs, but also requires recipients of public works contracts from the state to submit to the Fair Employment Practices Commission an "equal opportunity program" for "approval."¹⁰

Since the 1972 amendments to the Civil Rights Act, state and local government agencies are subject to the duty to take positive remedial action to remove discriminatory employment practices and their pervasive effects. Also, many public sector employers are required to comply

with federal executive order requirements because of contracts and grants received from various federal agencies for local governmental and educational programs.¹¹

Many public and private sector employers have thus become more than simply equal opportunity employers; they have actively sought through affirmative action to increase their representation of minority group and women employees in order to meet a goal of reflecting the proportion of minorities or women in the available occupational pool, in the local labor market, or in the population of the community. Also, attention has turned to particular professions or skilled occupations which traditionally have been predominately white male—a prime example in the public sector being the law enforcement and firefighting professions wherein a significant revolution has begun to take place in recruitment practices and testing, as well as in the definition of legitimate, job-related standards for physical requirements that do not categorically eliminate women or males of certain ethnic or racial groups.¹² The result has been an increase in the number of women and minorities in many employment areas.

Layoffs and Seniority

The nature of the equal opportunity challenge changed when the economy slumped in late 1973 and continued downward in 1974 and into 1975. When employers who had been making strides in minority and female employment cut back on hiring and in many instances began to lay off employees, attention turned to the impact of those reductions in force on employment opportunities.

In union-organized industries, unions have long sought, and for the most part won, job security for workers in the form of a last-in, first-out seniority rule as the primary layoff criterion.¹³ Seniority is an objective, and ostensibly color-blind, principle of determining competitive status among employees and a guarantee against use of subjective, discriminatory, or unfair criteria in awarding advantages. This principle has tended to impact, however, on recent gains made by minority and women employees, as the first to go have been these newcomers because of a seniority system that had been designed not to discriminate against any particular class of employees, but to favor the more senior as opposed to the more junior.

In an economically depressed setting, the effect of seniority in layoffs is often a disparate impact on minorities and women which, in some instances, has returned the ratio of minority and women to white male employees to pre-Title VII levels. Unemployment statistics show that layoffs in the private sector have affected minorities and females disproportionately, presumably due to two factors. First, those groups are concentrated in occupations most heavily hit—low-skilled and blue-collar jobs—and in industries which reflect greater fluctuations in employment during economic slumps—manufacturing and construction. Secondly, minorities and females represent a high proportion of marginal labor force participants, who are, therefore, lower on the seniority ladder when layoffs come.¹⁴

By far the largest of the categories of unemployed which comprise the official unemployment figures are job losers (others include new entrants or re-entrants to the job market and persons voluntarily unemployed while seeking a new job). Between 1973 and 1975, the number of persons unemployed because of job loss almost tripled, while total unemployment rose from 4.3 to 7.8 million, a comparison which indicates the increased importance of layoffs during that period. Minority workers, whose unemployment rates are always higher than those of whites, suf-

ferred more as job losers than did whites. For example, 4.7 per cent of the civilian labor force were job losers in 1975, but black workers comprised 18 per cent of those job losers although they make up only 11 per cent of the labor force.¹⁵

The Civil Rights Act was in large part a response to overwhelming evidence of unemployment and underemployment of nonwhite and female workers and to the conclusion that these phenomena were the result of overt employment discrimination as well as "patterns and practices" which are neutral on their face but have a disproportionate impact on women and ethnic and racial minorities. Recruitment and testing practices have been scrutinized, rejected, and revolutionized as a result of Title VII. Seniority, as a seemingly neutral but potentially discriminatory practice, came under the same kind of scrutiny when layoffs began to show an impact on minorities and women. The statistics illustrate the cause for this concern as unemployment rates for minorities and women, and particularly younger workers, outstripped the overall rates. In 1975, the peak of the unemployment cycle, the national unemployment rate was 8.5 per cent, but for nonwhites it averaged 13.9 per cent compared to 7.8 per cent for whites. For adult females, the rate was 8 per cent although for adult males it was 7.2 per cent. For teenagers, the 1975 unemployment rate reached 19.9 per cent, but for nonwhite teenagers it was 36.9 per cent. These unemployment figures do not include "discouraged workers," those who no longer are counted because they have ceased actively to seek work. The government estimated that 1.2 per cent of the civilian work force were discouraged workers in 1975, of whom 28 per cent were black.¹⁶

Budget problems of the public sector in recent years have produced problems similar in effect to those caused by economic conditions in private industry. Local public entities find that their expenditures exceed revenues, and crises such as those faced by the major cities of New York and Detroit in 1975 and 1976 have fostered an atmosphere of uneasiness and concern for budgetary restraint in local governments. Reduction in workforce has been one of the solutions adopted by local governments and educational institutions which are developing "retrenchment" plans, that is, methods of functioning within reduced revenues. Public employers face additional political pressures, to which private employers are not subjected, not to contribute to the unemployment rolls and to maintain employment opportunities for the disadvantaged when no other employers can or will do so.

The last-in, first-out rule is not as highly developed or firmly established as a formal rule in the public sector as it is in the organized private sector, but it appears in both negotiated agreements and civil service rules and, additionally, operates as a *de facto* principle when reductions in force, in response to financial pressures, do occur in public employment. Since merit system seniority rules are mentioned together with negotiated systems in Title VII, public sector seniority systems, whether contractual or regulatory, would be subject to the same tests as those in the private sector have been if the impact of public employee layoffs is contested in the courts as having adversely affected minority or female workers.

The Case Study: California

California local governments, like others in the nation, are increasing their efforts to preserve the public fisc. The influence of the financial crises of eastern metropolitan areas and the continuing widespread problem of rising property taxes, have led in some cases to decisions to reduce the public payroll. A case study of selected California local jurisdictions which have established a need to cut employment was made in order to determine how the issue of layoffs and

their potential impact on affirmative action hiring gains is being faced by public employers. Such a study presents a unique opportunity to view employers' responses before a potential adverse impact has resulted in discrimination suits. The case law has sorted out some of the equities between parties to the layoff-affirmative action conflict, but only after inequities have occurred. The goal for employers, particularly public employers with their high visibility and political vulnerability, is to avoid the conflict before it gives rise to charges of discrimination.

Therefore, following a detailed discussion of the broader problems with which this monograph is concerned, Chapter VI will examine how some employers have treated a potential impact on affirmative action hiring gains when reductions in force are anticipated; whether reductions in numbers of employees necessarily entail either layoffs or adverse impact on affirmative action gains; and what plans these local government employers have made to accommodate both further reductions in force and affirmative action goals. The answers to these inquiries provide a base from which to formulate an answer to the question—do alternatives exist to the affirmative action-seniority conflict?

¹42 U.S.C. Sec. 2000e et seq. (as amended by Equal Employment Opportunity Act of 1972). Title VII forbids discrimination on the basis of race, color, religion, sex, or national origin in hiring, firing, pay, and other terms and conditions of employment, including the segregation or classification of employees in a way that adversely affects employment opportunities or conditions because of race, color, religion, sex, or national origin.

²Employment discrimination is prohibited by a number of federal and state enactments, including the U.S. Constitution, Amendments V and XIV, and the California Constitution, Article I, Sections 4 and 8. Federal statutes directly prohibiting employment discrimination include several Civil Rights Acts (of 1866, appearing at 42 U.S.C. Sec. 1981; of 1871, at 42 U.S.C. Sec. 1983; of 1964, both Title VI and VII; and of 1968, appearing at 18 U.S.C. Sec. 245); the Equal Pay Act of 1963 and the Age Discrimination in Employment Act of 1967; both amended in 1974 to cover state and local employees; Rehabilitation Act of 1973, Sec. 503 (handicapped); and Executive Orders 11141 (1964), 11246 (1965, as amended by EO 11375), and 11478. Discrimination prohibitions are also contained as conditions upon which corporations, individuals, and local government agencies may receive grants of federal funds or federal contracts (e.g., intergovernmental Personnel Act of 1970; Public Health Services Act of 1943, as amended in 1971; Title IX of the Education Amendments of 1972; State and Local Fiscal Assistance Act of 1972, Title I [Revenue Sharing Act]; and also Executive Order 11246). California laws include the Fair Employment Practice Act and the Equal Pay Act, appearing in the Labor Code.

A manual summarizing all of these enactments has been published by the Institute of Industrial Relations, University of California at Los Angeles, entitled *Equal Employment Opportunity and Affirmative Action in Labor-Management Relations—A Primer* (1976).

³Executive Order 11246, as amended by Order 11375 (401 Fair Employment Practices 75 [Bureau of National Affairs, Washington], which established the Office of Federal Contract Compliance (OFCC) to administer and enforce the order in cooperation with various compliance agencies such as the Departments of Labor and Health, Education, and Welfare.

⁴*Hiatt v. City of Berkeley* (Ala. Co. Superior Ct., 1975) 10 FEP Cases 251 (being appealed); and *Brunetti v. City of Berkeley* 12 FEP Cases 937 (N.C. Cal., 1975) (not to be appealed).

⁵*Bakke v. Regents of University of California*, 18 Cal. 3d 34, 132 Cal. Rptr. 680 (1976). U.S. Supreme Court granted Certiorari February 1977.

⁶*Affirmative Action and Equal Employment, A guidebook for employers*, U.S. Equal Employment Opportunity Commission (Washington, D.C.: 1974), Vol. 1, pp. 4-5.

⁷*Ibid.*, pp. 1, 2.

⁸*Ibid.*, pp. 5-7; *Griggs v. Duke Power Company*, 401 U.S. 424, 432 (1971).

⁹Notable among equal opportunity consent decrees are the American Telephone and Telegraph settlement of January 18, 1973 (reported at 431 FEP 73, *Bureau of National Affairs Fair Employment Practices Reporter*); and the steel industry consent decree of April 15, 1974 (431 FEP 125).

¹⁰Labor Code, Div. 2, Part 4.5, Sec. 1410 et seq., 451 FEP 125. See Sec. 1431 (a) and (b).

¹¹For example, the University of California, a recipient of federal funds for research, underwent lengthy negotiations with the Department of Health, Education, and Welfare, the federal agency administering most of the funds, to develop an acceptable affirmative action plan, beginning with the Berkeley campus. HEW threatened a suit, and possible loss of \$500 million in grants annually, for U.C.'s failure to present an adequate plan. See "Minority Hiring Impasse at UC," *San Francisco Chronicle*, Thursday, January 23, 1975.

¹²In 1974, the California Fair Employment Practices Commission, following extensive investigation, accused four major California cities with sex and race discrimination in the hiring and promotion of police officers and firefighters. See "L.A. Among 4 Cities Accused of Police, Fire Dept. Job Bias," *Los Angeles Times*, July 2, 1974. A federal appeals court recently ruled that Los Angeles County's 5'7" height requirement for firefighters unconstitutionally discriminated against Mexican-Americans as it eliminated 45 per cent of otherwise eligible applicants of that ethnic group. (*Davis v. County of Los Angeles* 13 FEP Cases 1217 [9th Cir., October 20, 1976].)

¹³For an in-depth discussion of seniority and the relationship of fair employment laws, see George Cooper and Richard B. Sobol, "Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," *Harvard Law Review* 82 (June 1969) 1598. See also Chapter III below for further discussion of seniority.

¹⁴For a detailed discussion of the economic status of minorities in the nation in this particular context, see *Last Hired, First Fired: Layoffs and Civil Rights*, U.S. Commission on Civil Rights (Washington, D.C.: 1977), pp. 5-16. Statistics used in this chapter, on which these conclusions are based, appear in "Current Labor Statistics," *Monthly Labor Review* 99 (January 1976) 85 ff., and (September 1976) 69 ff.; and in *Employment and Training Report of the President, 1976* (Washington, D.C.: 1976).

¹⁵Julius Shiskin, "Employment and Unemployment," *Monthly Labor Review* 99 (February 1976) 3; and "Job Loss and Other Factors Behind Recent Increases in Unemployment," U.S. Department of Labor, Bureau of Labor Statistics, Report No. 446 (Washington, D.C.: June 1975).

¹⁶Shiskin, "Employment..." p. 3; and "Labor Month in Review," *Monthly Labor Review* 98 (December 1975) 2.

III.

Seniority in the Public Sector

The public sector is facing the possibility and, in some places, the reality of layoffs after decades of phenomenal growth.¹ The type of job security afforded public employees depends on whether seniority or individual merit prevails as a principle governing the order of layoffs. Job security based on merit may not necessarily eliminate inroads on affirmative action gains, but the principle does not automatically impact on the most recently hired.

The seniority principle may appear in civil service rules which, despite the merit concept inherent in most civil service systems, have in many instances adopted the last-in, first-out idea. Or it may appear in negotiated agreements as the public sector trend toward increased acceptance of collective bargaining and the unionization of public employees increases the incidence of negotiated contracts. The growing concern of public employees over job security and the traditional notion that seniority is the most fair means of allocating scarce jobs, leads to the conclusion that seniority will increasingly be a significant, if not the sole, criterion in determining the order of layoffs in the public sector, whether layoff rules appear in merit systems or in negotiated agreements.

Seniority and the Merit System

The merit system of public employment developed as a reaction to the "spoils" or political patronage system of awarding government jobs for political services. The purpose was to improve the quality of the public service by governing the selection, promotion, and retention of employees by open, competitive examinations so that the reward for an individual's merit and achievement would likewise contribute to the competency and continuity of the public service. Since the thirties, merit systems have been accepted in many state and local governments throughout the country.² In many jurisdictions, merit systems have expanded beyond hiring and promotion to govern other aspects of the personnel function, including job security.

The public sector developed job security protections as part of the merit concept guarantee that discharge decisions would be based on employees' performance or the needs of the service and not on discriminatory or political aims of employers. A primary function of merit systems is security against unfair disciplinary job loss, but many systems do not include procedures governing layoffs necessitated by reduction in service or elimination of specific programs. Those that do commonly require consideration of one or both basic criteria—length of service and employee performance—and there is little uniformity of language describing the relative weight to be given when both are included.

According to one authority, length of service or seniority is more standard,³ perhaps owing to the prevalence of tenure laws for public schools. For example, California's education code specifies that layoffs are to be by length of service among all personnel generally certificated and

competent, with no allowance for particular skills, experience, or ability. In federal employment, the U.S. Civil Service Commission has combined several layoff criteria, including the determination of which jobs may be eliminated with least harm to the service, then highest priority given to career employees (as opposed to short-term appointees), to veterans, and to length of service with added credit for a superior performance record. Seniority is thus the predominant factor in a major segment of the public sector governed by merit systems.

Influence From the Private Sector

Job security has long been a major issue for unions in the private sector. The objective has been protection against unfair discipline by means of grievance arbitration and against arbitrary selection of persons to be laid off through seniority rules. Public sector unions are emulating the model.

Formal seniority protections in the organized private sector are not unilaterally adopted by the employer, as has been the case in many merit systems or in school tenure laws. Rather they are the product of collective bargaining and the desire of unions to obtain some control over the hiring or advancement of its membership. The reasons for organized labor's "insistence on seniority systems" have been articulated in a study on seniority and fair employment practices: seniority provides employees with independence from whims or personal preferences of the employer; provides unions with means of objectively resolving competing claims among their members (and by the same token to favor members over nonmembers, or skilled over unskilled, etc.); and provides employees with some degree of predictability about employment security.⁴ Seniority also protects a newly acknowledged minority group—the "older worker."⁵

The success of this pursuit of seniority rights in the private sector is demonstrated by the nearly universal adoption of such provisions in negotiated agreements. A national survey of union contracts has disclosed that 92 per cent contain seniority provisions, governing primarily competitive status rights. Seniority determines the order of layoff "to some extent" in 85 per cent of the sample, is the "sole factor" in 42 per cent, the "determining factor" in 30 per cent, and a "secondary factor" in 11 per cent. The percentage in which seniority was the sole factor increased from 30 per cent in 1970 to 42 per cent in 1973.⁶ The "other" factor in these agreements is usually equal ability or skill between competing employees, with the clause often stating that if ability is equal then seniority shall determine the order of layoff. The weight this factor is given over seniority in practice, however, is likely to be less than the language would imply unless ability is widely divergent or seniority nearly equal. Although management may insist on formal acknowledgement of its right to select on the basis of ability, the idea of fairness which is the basis for seniority is likely to prevail in application of such layoff rules.

Seniority and the Growth of Public Sector Collective Bargaining

The issue of job security has taken on an increasingly significant role in public sector labor-management relations. First, there has been a move toward negotiated grievance procedures to replace or augment civil service disciplinary procedures. Then, a series of complex factors, including economic conditions and the slowing of the growth rate in public employment evident in the mid-seventies, has led public employees to be more concerned with security against layoffs as a bargaining issue and less as a matter to be left to unilaterally promulgated legislative or administrative protections.

With the rapid development in the past decade of collective bargaining in the public sector, the trend to broadening the functions of the merit system to cover more employment matters has begun to reverse as employee organizations seek bilateral determination of working rules and conditions. The compatibility of the merit system of civil service, as administered by a separate board independent from the governing body, and collective bargaining has been under debate for years, with some commentators predicting the end of the merit system. Others advocate a co-operative approach, with the traditional merit system governing hiring and promotion, but other terms and conditions of employment determined by a collective bargaining contract.⁷

This trend, as it relates to job security, has been the subject of study by the NYSSILR's Institute of Public Employment (Cornell). "There are a growing number of proposals favoring the separation of the merit principle from the merit system. Proposals suggest that the merit *principle* ... be retained while the merit *system* (which has come to encompass broad programs of personnel management in addition to the merit principle) should become a personnel function of public management subject to the collective bargaining process."⁸ Participants in a 1973 Cornell University symposium on job security in the public sector agreed that one of the major issues that would be brought to the bargaining table in the next few years would be job security and that collective bargaining would be the primary forum for resolving job security conflicts.⁹

In some public agencies, the lack of seniority protections or of any rules governing dismissals for economic reasons, have brought demands for negotiated protections. When financial stringencies begin to weaken the traditionally assumed security of public service jobs, the negotiating table becomes the arena for seeking a direct remedy for threatened security. Employees still turn to legislative or administrative lobbying, but often more to prevent erosions of existing protections, prompted by employers' attempts to modify seniority provisions. If statutory requirements are eliminated or weakened, employee organizations seek to fill the void with bilaterally established rules. Public managers have sought modification of tenure legislation and similar seniority rules to minimize the interference with management's prerogative of determining how effectively to provide services with reduced resources. Although not willing to include within the scope of bargaining the substantive determination of the need for layoffs, some employers prefer the flexibility of bargaining over the method of implementing a layoff to the rigidity of state statutes or civil service rules. This growing trend toward bilateral determination of layoff rules coincides with the growth of collective bargaining and an increase in the number of negotiated agreements.

Membership figures of public employee unions illustrate the significance of the well-documented development of collective bargaining in the public sector. In 1974, 51.5 per cent of state and local full-time employees belonged to employee organizations primarily concerned with improving conditions of employment. In over half the states, 40 per cent or more of public employees were organized in 1974. In California, 67 per cent of local government employees were organized in 1974.¹⁰

The growth of unionism is paralleled by the adoption of legislation permitting or mandating some form of collective negotiations in state or local governments in 37 states, ranging from comprehensive statutes modeled on the National Labor Relations Act, such as in New York, to regulations granting minimal rights to certain types of employees, such as in Texas.¹¹ In California, which allows cities and counties to adopt local employee relations policies, most major jurisdictions as well as many smaller agencies adopted policies in the first few years that the state legislation was in effect.¹² The increases in union membership and legislation have produced a concomitant increase in negotiated agreements. Between 1972 and 1974, the number of labor-man-

agement agreements in state and local governments increased by nearly 22 per cent, with the greatest increase in the number of "contractual" agreements as opposed to less formal "memoranda of understanding."¹³

As formal collective bargaining develops, based on legislation more closely resembling the private sector model and pursued by employee organizations emulating many of the union principles evolved in the private sector, it is reasonable to assume that seniority provisions comparable to the private sector tradition will occur.¹⁴ The new experience with public sector reductions in force will encourage that phenomenon.

¹Total public sector employment went over the 15 million mark in July 1976, up from 11.5 million 10 years earlier. State and local government increased from 8.6 million in 1966 to 12.6 million in July 1976. In California, 1.3 million persons were employed in state and local government in 1975, an increase of 40 per cent in the 10 years since 1966, compared to a 32 per cent increase in Michigan and a 26 per cent increase in New York over the same period. The rate of growth has slowed in the seventies, however, producing an actual decline in 1975 in municipal employment in both Michigan and New York and a decline in Michigan's state and local total employment. "Current Labor Statistics," *Monthly Labor Review*, 99 (September 1976) 77-78; *Public Employment in 1966*, U.S. Department of Commerce, Bureau of the Census (Washington, D.C.: 1967); *Public Employment in 1975* (1976).

²See O. Glenn Stahl, "Development of the Merit System," *Public Personnel Administration*, 6th ed. (New York: Harper & Row, 1971) pp. 29-41.

³*Ibid.*, p. 332.

⁴Cooper and Sobol, "Seniority and Testing Under Fair Employment Laws..." *Harvard Law Review* 82 (June 1969) 1604-07. For further comment on organized labor's interest, see Benjamin Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," *Harvard Law Review* 75 (1962) 1534-35 (Institute of Industrial Relations, University of California, Los Angeles; Reprint No. 113, pp. 1534-35).

⁵See Sara Behman, "The Affirmative Action Position," IRRA 1976 Spring Meeting, *Labor Law Journal* (August 1976), p. 492.

⁶"Layoff, Rehiring, and Work Sharing," *Basic Patterns in Union Contracts* (Bureau of National Affairs, 1976). Latest information, published in June 1976, based on 1973 survey of 400 contracts, selected from BNA's file of 5,000 as a representative cross section of the private sector.

⁷See *Collective Bargaining in Public Employment and the Merit System*, U.S. Department of Labor, Labor-Management Services Administration (Washington, D.C.: 1972); Don Vial, "The Scope of Bargaining Controversy," *California Public Employee Relations*, No. 15 (November 1972), pp. 2-26; and Edward L. Faunce, "L.A. SEIU Claims Law Requires CSC to Meet and Confer," *CPER* No. 23 (December 1974), pp. 42-45.

⁸June Weisberger, *Job Security and Public Employees*, Institute of Public Employment Monograph No. 2 (Ithaca: NYSSILR, Cornell University, 1973), p. 10.

⁹See Joseph Adler and Robert E. Doherty, eds., *Employment Security in the Public Sector: A Symposium* (Ithaca: Institute of Public Employment, Cornell University, 1974).

¹⁰*Labor Management Relations in State and Local Governments: 1974*, U.S. Department of Commerce, Bureau of the Census, and U.S. Department of Labor, Labor-Management Services Administration, State and Local Government Special Studies Report No. 75 (Washington, D.C.: 1976), pp. 1, 11.

¹¹Based on texts of public employee bargaining laws and synopses of case law and attorneys general opinions published, by state, in *Government Employee Relations Report Reference Service*, Bureau of National Affairs, current as of November 1976. The federal government reported 42 states had "Labor relations policies" in 1974, based apparently on a more liberal definition of a policy as one allowing for minimal representation rights. See *Labor Management Relations in State and Local Governments...*, p. 9.

¹²Meyers-Milias-Brown Act, effective 1969, Government Code Sec. 3500 et seq. See Marion Ross and Max DeGialluly, "Implementation of the Meyers-Milias-Brown Act by California's Counties and Larger Cities," *CPER* No. 8 (March 1971), pp. 6-21.

¹³*Labor-Management Relations in State and Local Governments...*, p. 3.

¹⁴In a January 1974 survey of the 400 state and local government agreements on file with the U.S. Bureau of Labor Statistics, 204 "mentioned" reduction in force, and 54 gave the union a "role in reductions." Seniority or other selection factors were not particularized. *Characteristics of Agreements: State and Local Government*, U.S. Department of Labor, Bureau of Labor Statistics, Bulletin No. 1861 (Washington, D.C.: 1975). See the case study in Chapter VI for a description of the occurrence of seniority provisions in California's public sector.

IV.

Seniority and the Courts: Private Sector

The viability of traditional seniority systems under the impact of Title VII is being explored by the courts as they seek to illuminate the meaning of the statute and balance the rights of affected employees in determining how far the parties are required to go to undo the effects of prior discrimination. While controversy continues to surround the issue, the federal courts have given shape to the law in several significant decisions decided by mid-1977. These cases, two of which have come from the U.S. Supreme Court, have upheld negotiated seniority rules, but some have modified individuals' seniority rights to accommodate the intent of the Civil Rights Act.

A brief summary of the major cases is presented here to illustrate the evolution of the case law, to highlight the questions which the courts have attempted to answer, and to present the legal context, developed largely in the private sector, in which public employers must frame their responses to layoffs.

Early 'Departmental Seniority' Cases

The first seniority cases in the equal employment opportunity area concerned promotion and transfer rights of minority workers in racially segregated departments or in segregated lines of progression. These "departmental" seniority cases dealt with rules that only allow seniority rights to accrue from the date an employee began work in a particular department ("job" or "departmental" seniority) rather than from the date of employment in the plant ("plant" or "employment" seniority). If an employee chose to transfer to a different department, he did not carry seniority with him but began at the lowest level in that department, the same as a new hire. In some racially segregated establishments, blacks were only hired into certain departments, which generally consisted only of lower-paying, less desirable jobs. After the effective date of Title VII in 1965, blacks had to be allowed to transfer to formerly all-white departments, but the seniority rules only permitted them to qualify for entry-level jobs rather than allowing them to use the time worked in the plant to compete for a higher level opening against white employees with less employment seniority. (Similar discriminatory job segregation against women has been common, and perhaps an even more widespread practice, but it was not an issue in the cases herein discussed.)

The two seminal cases on the validity of using job or departmental, rather than employment, seniority are *Quarles v. Philip Morris, Inc.*¹ and *Local 189, United Papermakers v. United States*.² The significance of these cases to the layoff question is that they demonstrate, in this early stage of the evolution of the law on the seniority versus equal rights conflict, the extent of the courts' willingness to alter seniority systems to conform to the intent of Title VII (although the Supreme Court's issuance of two opinions in similar cases nearly a decade later has superseded these early cases' value as legal precedent). The cases also provide the first judicial interpretation of the problematical seniority clause of Title VII, Sec. 703(h), which states in part:

Notwithstanding any other provision in this title, it shall *not* be an unlawful employment practice for an employer to apply...different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system,...provided that such differences are not the result of an intention to discriminate.... [Emphasis added.]

This section is the focal point in all the cases to be discussed herein of the differing views on whether a negotiated seniority provision can prevail if shown either to discriminate or to perpetuate the effects of past discrimination. Inquiry has turned to the legislative history of that section in order to determine when a seniority or merit system is "bona fide" under the meaning of the act and therefore not unlawful, and when it is not bona fide and can be set aside to accommodate to the purpose and intent of Title VII.³

One judicial interpretation of the legislative intent that has recurrently emerged is that the history is less than enlightening. In *Local 189 Papermakers*, the Fifth Circuit Court of Appeals termed the legislative history "singularly uninformative on seniority rights."⁴ The U.S. Supreme Court in its first seniority opinion remarked in interpreting that section that the "exact meaning and scope" were less than clear "in light of its unusual legislative history and the absence of the usual legislative materials."⁵ Nonetheless, the cases rely heavily on the section and its presumed meaning.

The history of the enactment of the section, very briefly, is that the initial bill, passed by the House of Representatives early in 1964, did not contain the section or any reference to the seniority issue. During subsequent debate in the Senate, criticism surfaced that Title VII would sacrifice employees' existing seniority rights. The bill's Senate sponsors placed in the record their own interpretive memorandum and a Justice Department statement which asserted that the bill would not affect established seniority rights, that its thrust was prospective rather than retrospective. Sec. 703(h) did not appear until a compromise substitute bill was introduced in the Senate, following extensive informal conferences between House and Senate leadership. The record is void as to whether this section, ultimately adopted by both houses in the compromise bill, was intended to embody those earlier, recorded statements or whether it has an independent meaning derived during the unrecorded give and take of the legislative process.

The departmental seniority cases hold that Sec. 703(h) does *not* categorically prohibit alteration of seniority systems. The district court in *Quarles*, which struck down departmental seniority rules for perpetuating the present consequences of past discrimination, dismissed Sec. 703(h) on the basis of its legislative history, noting that "it contains no express statements about departmental seniority. Nearly all of the references are clearly to *employment* seniority. [Emphasis added.]" The court interpreted the history to mean that Congress did not intend to impose "reverse discrimination" by requiring black employees to be preferred over white, but also "did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act."⁶ Although *Quarles* was only a district court case and therefore created no binding precedent for other courts, its "non-perpetuation" theory was accepted by several federal appeals courts in striking down departmental seniority systems that disadvantage minority group employees in competition for transfers or promotions. The Fifth Circuit Court of Appeals in *Local 189 Papermakers* explicitly accepted *Quarles*' interpretation of the section's legislative history vis-a-vis departmental or job seniority.

The basic argument over the effect of Title VII, and Sec. 703(h) specifically, turns on the fact that the act clearly was intended only to operate *prospectively*, not *retrospectively* to impose liability for pre-act discrimination. The court in *Local 189 Papermakers* adopts as its own the *Quarles*' rejection of a literal reading of this intent, which would have exempted from liability any seniority system that had existed prior to the act (and is not discriminatory on its face). "Sec. 703(h) expressly states the seniority system must be *bona fide*.... [O]bviusly one characteristic of a *bona fide* seniority system must be lack of discrimination. Nothing in 703(h), or in its legislative history, suggests that a racially discriminatory seniority system established before the act is a *bona fide* seniority system under the Act."⁷

Local 189 Papermakers, the first appellate decision on the issue, set precedent on departmental seniority. The court responded to three basic arguments on determining how far the employer must go to "undo the effects of prior discrimination,"⁸ and chose the moderate one, termed the "rightful place" theory, in fashioning a remedy for minority employees locked into a discriminatory seniority system.

In so doing, the court rejected the most conservative "status quo" theory, based on a literal interpretation of Sec. 703(h) and the materials in the legislative record, which would mean that all employees' seniority rights accrued up to the date the act was effective could not be altered, that the section exempts this particular employment practice from scrutiny under the act regardless of whether it has the effect of perpetuating past discriminatory practices. Noting that not all consequences of pre-act discrimination warrant relief under Title VII, the court also rejected the "freedom now" theory which would allow employees of a "protected class" (minority or female) to displace white employees who held jobs to which a protected employee's seniority in the plant would have entitled him but for the discriminatory job seniority rule.

In opting for the moderate theory, the court found that the "Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that 'locks in' prior racial classification." The court decreed that black employees could measure seniority based on time worked in the plant and could use that seniority to bid for transfer or promotion to openings in previously "white" jobs.⁹

The court did not prohibit the use of job seniority or departmental lines of progression *per se*. It merely indicated that when the system can be shown to perpetuate past discrimination against incumbent minority employees, and the employer fails to prove that "business necessity" (in the strict sense of that term, as developed by the courts¹⁰) requires the use of departmental seniority, the system must be altered to allow employees otherwise qualified to compete on the basis of plant or employment seniority.¹¹ (See the discussion in a following section of the U.S. Supreme Court's superseding decisions.)

Cases on Employment Seniority and Layoffs

Last-hired, first-fired problems were not answered by these early departmental seniority cases, as layoffs are usually governed by "employment" seniority. *Quarles* distinguished the two types of seniority issues when that court noted that the legislative history deals with "employment" rather than "departmental" seniority, thereby tossing the debate over the meaning of Sec. 703(h) right back into the courts for reexamination in the cases testing employment seniority rules.

Five major seniority cases have arisen in the private sector which have examined the seniority versus equal employment opportunity issue in the context of employment seniority. Of these, three have been federal court of appeals cases dealing specifically with layoffs by employment seniority (*Waters v. Wisconsin Steelworks*;¹² *Watkins v. Steelworkers Local 2369*;¹³ and *Jersey Central Power and Light Co. v. IBEW Local 237*¹⁴). The latest two are U.S. Supreme Court decisions which have not dealt with layoffs, but have settled many of the questions raised throughout the preceding litigation on the rights and obligations created by Title VII in the seniority-equal opportunity dilemma (*Franks v. Bowman*¹⁵ and *Int'l Brotherhood of Teamsters v. United States*¹⁶).

Although the underlying issue—how must a seniority system be altered to comply with the equal opportunity law—is the same as in the cases on promotion by departmental seniority, the stakes in the layoff situations are different. In the promotion cases, the question was whether a white employee's expectations could be sacrificed to provide a black employee with more time at the plant with the first chance at a better job, whereas in the layoff cases the question is who keeps a job at all. The difference in terms of respective rights of the employees may affect the courts' approach both to the legal question and the appropriate remedy.

The nonperpetuation theory expressed in *Quarles* was not applied to the layoff cases because the courts, on the facts of the cases before them, determined that the perpetuating effect of layoff and recall by seniority had not operated against individuals who were personally victims of unlawful (i.e., post-Civil Rights Act) discrimination. In determining that such "perpetuation" is not forbidden by Title VII, the courts again turned to the meaning of the act's seniority clause. The focus was on the reverse-discrimination dilemma of how much of the burden of obliterating the effects of past discrimination should be borne by the white incumbent, who is innocent of intent to discriminate, but has benefited by a system which operated in his favor.

Waters, the first appellate court treatment of the last-hired, first-fired rule, held that the seniority system was not discriminatory nor did it have "the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII," even though the system had its genesis during a time when the employer, according to the trial court's findings, did not hire non-white bricklayers and the black plaintiff had unsuccessfully applied for a job during that period.

The court found the seniority system to be racially neutral and relied on the legislative history of Title VII to support its view that an employment, as opposed to a departmental, seniority rule is by definition *bona fide* under the act and therefore lawful. The court found language in both *Quarles* and *Local 189 Papermakers* to support that conclusion. Since all bricklayers, black and white, were being laid off on the basis of the date of hire, not by any rule that otherwise gave preference to whites, the court concluded that to give black employees super-seniority, in an effort to compensate them for pre-act discriminatory practices of the employer, was prohibited by Sec. 703(h). The court quoted the Fifth Circuit in *Local 189 Papermakers*:

It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination.... In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment.¹⁷

Watkins v. Steelworkers, the second layoff case, arose in the Fifth Circuit. Unlike *Waters*, wherein the circumstances were of periodic layoffs and recalls of a small force of skilled bricklayers, *Watkins* dealt with a massive reduction in force that eliminated all black employees hired since the company began hiring blacks after 1965.

The appeal court overturned the district court order, which had ruled that the seniority system was discriminatory because it perpetuated the effect of pre-act discrimination. The lower court had relied both on the departmental seniority cases and a line of union referral cases in which a past history of exclusion of blacks from certain unions prevent blacks, once admitted, from accumulating sufficient work experience to compete with whites for limited job referrals. Such practices have been found unlawful as perpetuating prior discrimination, but the appellate court ignored that line of authority.¹⁸

The Fifth Circuit Court sought to align itself with the only other circuit courts that had ruled on the issue (in *Waters* and in *Jersey Central*) when it ruled:

[R]egardless of an earlier history of employment discrimination, when present hiring practices are non-discriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or Sec. 1981,¹⁹ even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination."²⁰

The court found that the black plaintiffs were not in fact prevented from accumulating seniority because of prior discriminatory practices, but rather because all were too young to have seniority sufficient to withstand the layoff that reached to employees with 25 years of service. None of the plaintiffs had applied for employment (nor even been of legal employment age) before the company ended its discriminatory hiring in 1965, so the court was careful to note that it was not deciding the rights of employees who would have had sufficient seniority to withstand a layoff but for the discriminatory refusal to hire them personally. The court stated:

To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites.... The result which plaintiffs seek, therefore, is not the personal relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j).²¹

The court distinguished the *Local 189 Papermakers* ruling that a seniority system that perpetuates past discrimination is not *bona fide* under Sec. 703(h) by stating: "Inasmuch as none of the plaintiffs have suffered individual discrimination at the hands of the Company, however, there is no past discrimination toward them which the current maintenance of the layoff system could possibly perpetuate."²² The opinion concludes that, even if the seniority system had been found to be discriminatory, under the rationale of *Local 189 Papermakers* it would still be *bona fide* because "a total employment system which accords white workers preference only over junior blacks on the basis of total employment [as distinguished from departmental employment] is a *bona fide* seniority system under Sec. 703(h)...."²³

The last of the three appellate cases, *Jersey Central*, approaches the seniority question from a different perspective and serves to illustrate the great complexities of the seniority question. Layoff constituted the triggering fact situation, but the case was brought by the employer, rather than aggrieved employees, who sought a declaratory judgment on its obligations under two apparently conflicting mandates: a conciliation agreement with the EEOC and the unions imposing an affirmative action program that required the company to increase the number of minority and women employees, and the collective bargaining agreement which provided that layoffs would be by seniority, a process that would effectively decrease the number of minority and women employees. (The case presents an interesting parallel to a potential public sector conflict between mandates contained in an affirmative action resolution and seniority rules contained in either a civil service regulation or negotiated agreement.)

Jersey Central Light and Power Company had sought judicial relief when EEOC informed it that proposed layoffs, by reverse order of seniority as required in its labor contract, would violate the conciliation agreement, as well as Title VII. The district court agreed with EEOC and ordered the company to impose layoffs, in a manner inconsistent with the collective bargaining contract, that would result in the ratios of minority and female employees being the same as those existing before layoffs commenced. The court of appeals reversed, finding that the two contracts did not conflict because the conciliation agreement only dealt with the company's duty to hire and was silent as to either layoffs or seniority. Therefore, the company was free to lay off according to the terms of the union contract.

The appellate court went on to discuss whether layoff by seniority, despite the union contract, is void in view of the equal rights policy enunciated in the Constitution and Title VII, and concluded that it is not. "While the legislative history of Title VII is largely uninformative with respect to seniority rights, it is evident to us that Congress did not intend that a *per se* violation of the Act occur whenever females and minority group persons are disadvantaged by reverse seniority layoffs."²⁴

The final point in the opinion was revised because of the Supreme Court's issuance of its first seniority-equal opportunity case, *Franks v. Bowman*. The *Jersey Central* case was brought before the Supreme Court for review, and, rather than issue an opinion, the high court remanded the case back to the court of appeals for reconsideration in light of the *Franks* ruling, which had not been decided when the lower court was composing its decision.²⁵ The appellate court determined that its opinion was consistent with the Supreme Court's interpretation of the law but for the final holding.

In the original decision, the appellate court had found that Sec. 703(h) sanctioned all bona fide plant-wide seniority systems: "Congress intended to bar proof of the 'perpetuating' effect of a plant-wide seniority system as it regarded such a system as 'bona fide.'"²⁶ On remand, the court noted that the Supreme Court had chosen a "more restrictive interpretation" of Sec. 703(h) which, in cases of individual discrimination occurring after enactment of the Civil Rights Act, permits an award of retroactive seniority. The court in turn remanded the case back to the district court to make findings as to whether any individual employees (none were party to the suit as originally brought) had suffered post-act discrimination and therefore might be entitled to constructive seniority.²⁷

Supreme Court Seniority Decisions

These appellate cases on employment seniority and layoffs left unanswered some key questions essential to an understanding of the controversial seniority clause in Title VII and, consequently, to an understanding by employers, unions, and employees of their rights and duties when seniority rights and equal employment opportunity complaints conflict. All of these cases had found that, under the fact situations presented, the disparate impact on minority employees did not cause the seniority system to be in violation of Title VII, yet they did not rule out the possibility that a seniority system could violate the act in other circumstances in which Sec. 703(h) might not be an effective shield.

In its 1976 and 1977 landmark decisions—*Franks v. Bowman* and *Teamsters v. U.S.*—the U.S. Supreme Court has clarified much of that uncertainty by deciding that Sec. 703(h) of Title VII does not bar relief for certain categories of protected employees who claim to have been adversely affected by the operation of a seniority system. Although layoffs were not at issue in these two cases, layoffs cause the most critical application of the seniority principle. Employees who seek seniority do so primarily for job security reasons, either as protection against layoffs or, as in these two cases, for competitive status to bid for scarce jobs. The right to a judicial award of this protection in Title VII cases varies according to the status of individuals seeking relief, and the Supreme Court clarified the existence of this right for some of these groups.

The types of individuals who have sought judicial relief include workers who applied for jobs and were discriminatorily rejected, some of whom may have later been hired after the employer altered his practices and some of whom are currently seeking jobs. Both want retroactive seniority to the date they were initially rejected. Another group consists of incumbent employees who were turned down for preferred jobs for discriminatory reasons, but were hired into lesser positions and who now want the better jobs with back seniority. Others are applicants seeking jobs who never applied previously because they knew of the employer's discriminatory practices and believed an application would be futile. The right to judicial relief is further affected by the crucial distinction as to whether the discrimination occurred before or after the effective date of the Civil Rights Act.

Both of the Supreme Court decisions deal with the seniority issues in a non-layoff context which allowed the court to set forth principles applicable to any situation in which seniority rights are seen to conflict with equal employment rights, whether it is in hiring, promotions, transfers, or layoffs. The cases, therefore, transcend the departmental-employment seniority distinction that was developed in the prior cases. Both of these cases emerged from the trucking industry and dealt with the practice of hiring minority drivers only for local, less well-paying runs, and white drivers for more desirable and remunerative long-distance runs. The seniority earned in the short-haul jobs could not be used to compete for long-haul jobs after the employers had ceased to discriminate and had hired minority workers as distance drivers. Thus, the two cases deal with essentially the same type of seniority principle addressed in the "departmental seniority" cases, but the court's language does not limit its ruling to departmental seniority systems.

In *Franks v. Bowman*, the significant holding is that an employment seniority system must be altered to remedy individual discrimination suffered by employees since the enactment of the Civil Rights Act and that Sec. 703(h) does not prohibit such a remedy. The case is limited in that it only deals with prospective application of Title VII, as the court was not faced with em-

ployees complaining of discriminatory actions occurring before 1965, and therefore does not reach the concept of a present, nondiscriminatory employment practice that nonetheless perpetuates effects of pre-act discrimination.

The plaintiffs in the case were black truck drivers who, until 1972, were denied employment in highly desirable "over-the-road" driving jobs. They sought an award of retroactive seniority and back pay for the period since the date their applications for the over-the-road jobs were rejected for discriminatory reasons. In ruling that both back pay and retroactive or "constructive" seniority were appropriate relief, the Supreme Court makes several points concerning the intent and effect of Title VII, particularly Sec. 703(h), and the necessity of awarding seniority benefits in order to effectively remedy employment discrimination.

On the intent of Title VII and Sec. 703(h), the court, after noting the inadequacy of the legislative history, states.

[T]he thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the *post-Act operation* of a seniority system is challenged as *perpetuating the effects of discrimination occurring prior to the effective date of the Act*. There is no indication in the legislative materials that Sec. 703(h) was intended to modify or restrict relief otherwise appropriate once an illegal discriminatory practice occurring after the effective date of the Act is proved—as in the instant case, a discriminatory refusal to hire. [Emphasis added.]²⁸

In finding that an award of retroactive seniority is within the types of relief contemplated by the act, the court states: "Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity...and ordained that its policy of outlawing such discrimination should have the 'highest priority'...." Congress vested the courts with broad discretion "to fashion the most complete relief possible" in order to "make the victim of unlawful employment discrimination whole...."²⁹ Unless the victim of discrimination can be placed in the position on the seniority ladder he would have had but for the discriminatory refusal to hire him, adequate relief may be denied. "[T]he issue of seniority relief cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination in a way that back pay, for example, can never do."³⁰

The court then discourses on the importance of seniority as a requisite of employment in support of its conclusion that the plaintiffs must be awarded constructive seniority. "Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation.... [O]ne of its major functions is to determine who gets or who keeps an available job." In the case under review, seniority standing determined not only layoff and recall but also who was the highest bidder for either scarce or the best driving jobs. Without an award of constructive seniority rights, the plaintiffs would "perpetually remain subordinate to persons who, but for illegal discrimination, would have been in respect to entitlement to these benefits his inferiors."³¹

The court also responded to the "reverse discrimination" issue raised by the employer and declares that to deny an award of seniority on the ground that it would diminish the expectations of the other "arguably innocent employees would, if applied generally, frustrate the central 'make-whole' objective of Title VII. These conflicting interests of other employees will, of

course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority hierarchy." (The Supreme Court will have an opportunity to speak directly to the reverse discrimination issue in a constitutional context, rather than under Title VII, in its review of a California case which found that a special minority admission program for medical school constituted unconstitutional discrimination against a white applicant.)³²

The court also rejects the argument that alteration of the seniority rights of innocent employees deprives them of a "vested right." "This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest," such as seniority for a returning veteran for time spent in the military service.³³

The decision emphasizes that the award of retroactive seniority to proven victims of post-act hiring discrimination did not require the alteration of the seniority system itself, which was neutral on its face. It was the hiring practices, not the seniority system, that were unlawful. The decision merely required that the plaintiffs be granted a rank whereby they would obtain the benefits inherent in the system, namely competitive status to bid for limited benefits as well as noncompetitive, remunerative benefits such as vacations.

Even though *Franks* awarded retroactive seniority, in an opinion replete with expansive language concerning make-whole remedies, and the appellate decision in *Watkins* did not, the basic holdings of the two cases are consistent. *Franks* awarded relief because it found that the plaintiffs were the victims of post-act discrimination, and *Watkins* clearly found that the plaintiffs were not victims of discrimination at all. Other language in the two cases presents differing views of the extent of the seniority exemption in Sec. 703(h), and *Franks* set the stage for a more restrictive interpretation of the seniority protections mandated by that provision, which the court further developed in its second seniority case.

Franks left open two key questions—whether victims of *pre-act* discrimination are entitled to retroactive seniority and whether applicants who did not apply for jobs because they were discouraged by knowledge of the employer's discriminatory practices might be classed as victims of unlawful discrimination. Both questions received definitive answers in the court's second exercise on the subject in *Teamsters v. United States*, in which the court referred back to its prior opinion and builds its interpretation of Title VII from that base.

On the issue of whether Sec. 703(h) permits an award of retroactive seniority to remedy pre-act discrimination, the *Teamsters* opinion states that, were it not for that section, a seniority system would be struck down if it perpetuated prior discrimination. Even if a system is not discriminatory on its face, under the rationale of *Griggs v. Duke Power* an employment practice is unlawful under Title VII if it is "fair in form but discriminatory in operation." The court holds, however, that the literal terms of Sec. 703(h) and its legislative history demonstrate that the act was not meant to be applied retrospectively. The "unmistakable purpose of Sec. 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII," even if it operated "at the expense of pre-Act discriminatees."³⁴

The court rejected the EEOC's arguments that no seniority system that tends to perpetuate even pre-act discrimination can qualify as a bona fide system, and notes that it could not "accept the invitation to disembowel Sec. 703(h)" by giving it that interpretation.³⁵ As in *Franks*, the court emphasizes that the seniority system itself was bona fide because it was not discrimina-

tory on its face, but that employees unlawfully disadvantaged under it because of the employers' prior unlawful hiring practices must be granted their "rightful place" in the seniority ranks.

On the second major issue, the court holds that incumbent employees who did not apply for the long-haul positions may nonetheless qualify for retroactive seniority. (In so ruling, the court sets to rest an issue which also appears in the public sector seniority cases to be discussed in the next chapter.)

The court first rules that minority drivers who did apply for long-distance runs and were rejected had established a presumption that they were discriminatorily refused because of the overwhelming evidence presented of racial and ethnic bias in the company's hiring practices. The employer has the burden of rebutting that presumption by proving that the employee was rejected for lawful reasons. Then the court interprets the "make-whole" intent of Title VII and concludes:

Victims of gross and pervasive discrimination [may not] be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. A *per se* prohibition of relief to nonapplicants could thus put beyond the reach of equity the most invidious effects of employment discrimination.... A consistently enforced discriminatory policy can surely deter job applications from those who are...unwilling to subject themselves to the humiliation of explicit and certain rejection.³⁶

The only nonapplicants in the case were incumbent employees in the short-haul positions, so the ruling does not open up potential relief to all members of the community who may wish to come forward and claim to have been deterred applicants. The court comments that, since the class consisted only of employees, it is "likely that every class member was aware of the futility of seeking a line-driver job and was therefore deterred from [applying]"³⁷ The court also emphasizes that this ruling only permits nonapplicants to come to the trial court, to which the case was remanded, and meet the difficult task of proving that they would have applied but for the company's discriminatory practices.

The opinion also discusses the difficult task left to the district court of determining the actual relief to be granted. The lower court must determine whether the individual plaintiff either was or would have been an applicant, whether the applicant was qualified and therefore would have been hired but for the unlawful practices, and whether and when vacancies in the long-haul positions had occurred. The high court also notes the "delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing."

Summary of the Case Law

In summary, the key holdings of these private sector employment seniority cases and the Supreme Court's opinions are:

1. An employment, as distinguished from departmental, seniority system that is neutral on its face is valid under Title VII, even though it had its origin in the pre-act period when the employer practiced discrimination (*Waters*).

2. An employment seniority system that has a disparate impact on minority employees, even to the point of eliminating all minorities from the work force, does not violate Title VII so long as none of the plaintiff employees suffered individual discrimination at the hands of the employer (*Watkins*).

3. A union contract provision requiring layoff by employment seniority is valid, as it is not contrary to public policy as expressed in Title VII and does not conflict with the general intent of an affirmative action agreement with EEOC which is silent on layoffs and seniority (*Jersey Central*).

4. An individual who has suffered post-act hiring discrimination, with the effects thereof perpetuated against that person by an otherwise neutral employment seniority system, is entitled to retroactive seniority to restore him to his rightful place. Sec. 703(h) of Title VII does not exempt a seniority system under those circumstances (*Franks*).

5. Victims of pre-act hiring discrimination are barred by Sec. 703(h) of Title VII from receiving an award of retroactive seniority to overcome the effects of discriminatory practices. Post-act discrimination, which is perpetuated by operation of an otherwise bona fide seniority system, entitles both rejected job applicants and nonapplicants (who can prove they were deterred from applying by the discriminatory practices) to retroactive seniority to restore them to their rightful place on the seniority ladder (*Teamsters*).

Thus, Title VII has not been interpreted to uphold the gains of affirmative action programs, even those mandated by courts' desegregation rulings or consent decrees, if a bona fide seniority system requires another result. To violate the seniority rights of white or male employees, accrued under operation of a seniority system neutral on its face, solely to benefit a person who has been previously disadvantaged but who has not individually suffered unlawful discrimination, constitutes reverse discrimination or preferential treatment prohibited by Title VII.

The only protection against layoff by seniority plainly available to the beneficiary of an affirmative action plan is that which allows a person who has suffered post-act discrimination, such as a discriminatory refusal to hire or promote, to be awarded retroactive seniority. That remedy, although designated the "rightful place" approach, may not in fact place individuals in the same position they would have had but for the discrimination, but may give them sufficient seniority to withstand layoff.

These cases limit relief to individuals who can prove that they have been the victims of discrimination. They indicate little likelihood that future cases would grant relief to the broad class of unemployed or underemployed nonwhites and females whom affirmative action plans are meant to benefit because proof of personal discrimination is crucial. If segregated lines of progression have kept persons out of particular jobs, those people are either present or prior employees of the offending employer, with access to records that can prove the personal impact of the discriminatory practice. That proof will qualify them for a seniority remedy such as that granted in the two Supreme Court decisions or the earlier departmental seniority case, as is demonstrated in one of the public sector cases discussed in the next chapter—*Acha v. Beame*. *Teamsters'* extension of that remedy, to those who could prove they were deterred from applying for a job, was limited to persons who were already employees, and, therefore, presumed to have had knowledge of the unlawful practice. It is doubtful that new hires or new applicants could as readily prove that they had been deterred from applying previously because of their knowledge of that employer's unlawful practices.

The Supreme Court has made it clear in its two landmark cases that it will limit inroads on the protection for seniority rights that Congress apparently intended when it added Sec. 703(h) to the Civil Rights Act. Therefore, it does not seem likely that the high court will be searching for means of sustaining affirmative action gains against the impact of layoffs by seniority if no clear evidence is presented of individual, post-act employment discrimination.

EEOC and the Seniority Issue

A discussion of equal employment law and seniority would not be complete without reference to the Equal Employment Opportunity Commission. As the government agency charged with administering Title VII, the commission's interpretation of the statute and its anticipation of the direction the courts might take in developing case law bears a good deal of weight in how Title VII actually affects employers, unions, and employees, both as victims and innocent beneficiaries of past discriminatory practices. Its views bear directly on the nature of conciliation agreements and consent decrees and, through its published guidelines and the influence of its staff, on the nature of voluntary affirmative action plans. The EEOC is, of course, involved in litigation and argues its position before the courts, as a party or as a "friend of the court," thereby affecting the courts' analyses and understanding of the issues and, to varying degrees, the opinions that emerge.³⁸

Early in 1975, the EEOC was considering publishing guidelines on the seniority and lay-off issue. The commission eventually decided against releasing them, owing to the evolving nature of the case law at that time (all of the employment seniority cases discussed herein were decided in 1975 through 1977).³⁹ The Bureau of National Affairs issued a report on the layoff problem in February 1975 in which it recounted what was generally understood to be EEOC's position at that time.⁴⁰

According to that report, the commission, as indicated in court briefs and other official documents, was in sympathy with the approach advocated by the New York City Commission on Human Rights.⁴¹ The main directive of the New York commission was that employers should seek out all alternatives to avoid an adverse impact on recently hired minority and female employees. If no "feasible alternatives" to layoffs existed, the memorandum acknowledged that layoffs might then "constitute a business necessity" under *Griggs v. Duke Power*. The BNA report stated the general assumption that the EEOC would have preferred to minimize the effect of Sec. 703(h) by saying that a seniority system which perpetuates past discrimination is not bona fide, but if there was no past discrimination, the seniority system would be valid even if it had an adverse impact on a protected class. But in view of its advocacy of *Griggs*' definition of discrimination—a disparate impact on a protected class not justified by a business necessity constitutes discrimination—the New York commission would not have granted much sway to Sec. 703(h).

The subsequent development of the law by the federal courts has somewhat altered this rather expansive vision of the impact of Title VII on seniority systems. In 1975, the EEOC unsuccessfully argued before the Court of Appeals in the *Jersey Central* case that, as all of the discrimination in question occurred after enactment of Title VII, the seniority system was not bona fide and Sec. 703(h) was not a bar to correcting seniority inequities. The EEOC's position was ultimately upheld by the Supreme Court in *Franks*, and *Jersey Central* was subsequently modified to comply.

In its brief in the appeal to the Supreme Court of *Jersey Central*, the EEOC pointedly did not concede that pre-act discrimination should be subject to a different rule, implying that such discrimination might also render a seniority system not bona fide, an argument raised and rejected by the Supreme Court in the *Teamsters* case, discussed above. As to the definition of discrimination, the *Jersey Central* brief reiterates the *Griggs* rule that Title VII prohibits "not only overt discrimination but also practices that are fair in form but discriminatory in operation," adding that it is "the consequences, not the intent, of an employer's actions [that determine] whether a particular employment practice is unlawful."^{4 2}

The EEOC expressed its post-*Franks* position in December 1976 in a friend-of-the-court brief submitted to the Fifth Circuit Court of Appeals. In line with the Supreme Court's decision, the EEOC said it believed that Sec. 703(h) did not bar judicial interference with all employment seniority systems, but conceded that it would protect an employment seniority system which perpetuated the effects of pre-act discrimination and had a disparate impact on minorities or women as a class. "However, where an individual can establish that he or she, personally [sic], was a victim of past discrimination and, as a consequence, has an inferior seniority status, Sec. 703(h) does not prevent a court from ordering adjustments in the individual's seniority status to remedy this lingering effect of past discrimination."^{4 3}

The EEOC indicated, at the time that this monograph was being written, that no guidelines were imminent, despite the urgings of interested organizations and individuals.^{4 4} The U.S. Commission on Civil Rights, for one, has strongly urged the EEOC to respond with some directives. In a 1977 report on the seniority-equal rights problem, the CRC stated its belief "that the 'last-hired, first-fired' conflict mandates explicit Federal guidelines by the Equal Employment Opportunity Commission in accordance with its authority and responsibility under Title VII." The CRC advocated that the guidelines pronounce all seniority systems invalid if applied to a "work force that does not mirror the relevant labor market and the composition of which cannot be explained successfully by the employer," and that layoffs, or alternative cost-saving plans, not be permissible if they have an adverse impact on minorities and women.^{4 5}

Until the EEOC decides that the case law has stabilized sufficiently to warrant official guidelines, or that guidelines are appropriate at all, the individuals charged with adapting employment practices to comply with the law are left with the court decisions to fashion their course of action.

¹ 279 F. Supp. 505, 1 FEP Cases 260 (D.C.Va., 1968).

² 416 F.2d 980, 1 FEP Cases 875 (5th Cir., 1969). Certiorari denied, 397 U.S. 919 (1970).

³ Discussion of Sec. 703(h) and its legislative history appears in all the seniority cases as well as in several critical articles. Among the latter is a significant study of the seniority question, Cooper and Sobol, "Seniority and Testing Under Fair Employment Laws..." *Harvard Law Review*, 82 (June 1969) 1598. (The authors were attorneys in two landmark equal employment cases, *Griggs v. Duke Power* 401 U.S. 424 (1971), and *Local 189 Papermakers* [supra, Ftn. 2].) Another comprehensive discussion appears in a more recent law review comment, Ellen R. Joseph, "Last Hired, First Fired Seniority, Layoffs and Title VII," *Columbia Journal of Law and Social Problems*, 11 (Spring 1975) 343. The U.S. Equal Employment Opportunity Commission published an official record in *Legislative History of Title VII and XI of Civil Rights Act of 1964* (Washington, D.C.: 1968).

⁴416 F.2d 980, 987, 1 FEP Cases 892.

⁵*Franks v. Bowman* 424 U.S. 747, 761, 12 FEP Cases 549, 554 (1976).

⁶279 F.Supp. 505, 516, 1 FEP Cases 260, 269.

⁷416 F.2d 980, 988, 1 FEP Cases 875, 880.

⁸These three theories were expounded in the law review note, "Title VII, Seniority Discrimination and the Incumbent Negro," *Harvard Law Review*, 80 (1967) 1260.

⁹416 F.2d 980, 988, 1 FEP Cases 875, 881.

¹⁰The business necessity test was recently reiterated in a departmental seniority case which held that the employer's facially neutral seniority system that perpetuated past discrimination might not violate Title VII if the system were justified by business necessity, "with no less discriminatory alternatives available." (*Stevenson v. Int'l Paper Co.* 516 F.2d 1013, 10 FEP Cases 1386 [5th Cir., 1975].) The courts require close scrutiny to determine whether a practice is required by business necessity, which has been described as "not merely whether there exists a business purpose" but also whether the practice is "so essential to the safe and efficient operation of the business as to override any racial impact." (*Robinson v. Lorillard Corp.*, 444 F.2d 791, 3 FEP Cases 653 [4th Cir., 1971].) Also "[if] the legitimate goals of safety and efficiency can be served by any reasonably available alternative system with less discriminatory effects, then...the system may not be retained." (*U.S. v. Bethlehem Steel*, 444 F.2d 652, 3 FEP Cases 589 [2d Cir., 1971].)

¹¹416 F.2d 980, 989, 1 FEP Cases 875, 881.

¹²502 F.2d 1397, 8 FEP Cases 577 (7th Cir., 1970).

¹³516 F.2d 41, 10 FEP Cases 1297 (5th Cir., 1975).

¹⁴508 F.2d 687, 9 FEP Cases 117 (3rd Cir., 1975). Remanded by the Supreme Court without opinion, 44 LW 3669, 12 FEP Cases 1335.

¹⁵424 U.S. 747, 12 FEP Cases 549 (1976).

¹⁶*International Brotherhood of Teamsters v. United States; T.I.M.E.-D.C., Inc., v. United States*, __ U.S. __, 97 S.Ct. 1843, 14 FEP Cases 1514 (1977).

¹⁷416 F.2d 980, 994-95, 1 FEP Cases 875, 886-87.

¹⁸369 F.Supp. 1221, 7 FEP Cases 90 (D.C.La., 1974).

¹⁹42 U.S.C. Sec. 1981. Enacted in 1866, this civil rights statute guarantees all persons the same right to make and enforce contracts and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. It is a broad grant of the equal right to contract and contains no limitation like Sec. 703(h) of the Civil Rights Act of 1964. Therefore, seniority is not a defense, per se, against practices found to be discriminatory in an action brought under Sec. 1981 which charges that a seniority system unequally affects black employees' employment contracts. In *Watkins* the EEOC argued that the Sec. 703(h) defense was irrelevant to the cause of action brought under Sec. 1981, but the court found the seniority system not to be discriminatory and hence did not go further into the Sec. 1981 claim. However, under general principles of statutory construction, Title VII, as the later and more specific statute, could be regarded as an interpretation of the intent of the more general Sec. 1981, and Sec. 703(h) could be an implied limitation on a Sec. 1981 claim to a remedy against a seniority system. This latter view is expounded by Michael A. Warner in "Seniority Systems—The Impact of Recent EEO Decision," *Proceedings of the Second ABA National Institute on Equal Employment Opportunity Law*, American Bar Association Section of Labor Relations Law (Chicago: 1976), p. 108.

²⁰516 F.2d 41, 44, 10 FEP Cases 1297, 1300.

²¹ 516 F.2d 41, 46, 10 FEP Cases 1297, 1301.

²² 516 F.2d 41, 47, 10 FEP Cases 1297, 1302.

²³ 516 F.2d 41, 52, 10 FEP Cases 1297, 1306.

²⁴ 508 F.2d 687, 705, 9 FEP Cases 117, 129.

²⁵ The Supreme Court granted certiorari on EEOC's appeal, but issued no opinion, merely remanding the case back to the Court of Appeals, 44 LW 8669, 12 FEP Cases 1335 (1976).

²⁶ 508 F.2d 687, 706, 9 FEP Cases 117, 129.

²⁷ 542 F.2d 8, 10, 13 FEP Cases 762, 763 (3rd Cir., 1976).

²⁸ 424 U.S. 747, 761-62, 12 FEP Cases 549, 554-55.

²⁹ 424 U.S. 747, 763, 764, 12 FEP Cases 549, 555.

³⁰ 424 U.S. 747, 768, 12 FEP Cases 549, 559, at footnote 28.

³¹ 424 U.S. 747, 766, 768, 12 FEP Cases 549, 558, 559.

³² 424 U.S. 747, 775, 12 FEP Cases 549, 559. *Bakke v. Regents of the University of California*, 18 Cal. 3d 34 (1976).

³³ 424 U.S. 747, 778, 12 FEP Cases 549, 561.

³⁴ 97 S.Ct. 1843, 1863, 14 FEP Cases 1514, 1526.

³⁵ 97 S.Ct. 1843, 1863, 14 FEP Cases 1514, 1526.

³⁶ 97 S.Ct. 1843, 1870-71, 14 FEP Cases 1514, 1532.

³⁷ 97 S.Ct. 1843, 1871, 14 FEP Cases 1514, 1533.

³⁸ In a 1975 sex discrimination case, the Fourth Circuit Court of Appeals discussed the Supreme Court's dicta that EEOC guidelines should be given "great deference" in construing the Civil Rights Act. The appellate court concludes, after reviewing conflicting views, that it would follow the commission's guidelines, but that its opinion would have been the same on the issue in point "*whatever might be the language of the Commission's guidelines.*" [Emphasis in original.] *Gilbert v. General Electric Co.*, 519 F.2d 661, 10 FEP Cases 1201, at fn.12.

³⁹ See *Daily Labor Report* No. 58 (March 25, 1975), A 14; and *Daily Labor Report* No. 73 (April 15, 1975), A 20.

⁴⁰ "Laying Off Employees Pursuant to a Seniority System," Bureau of National Affairs Special Report No. 36, February 21, 1975 (Washington, D.C.).

⁴¹ "Interpretive Memorandum Concerning Procedures Required by Federal, State, and Local Anti-Discrimination Laws When An Employer Is Planning Reduction in Labor Costs that Could Result in Layoffs," New York City Commission on Human Rights (New York: January 1975).

⁴² Brief filed with petition for writ of certiorari in *Jersey Central Power and Light Co. v. IBEW*, *supra.*, at p. 11-12.

⁴³ Brief filed with the Fifth Circuit Court of Appeals in *Delay v. Carling Brewing Co.*, Docket No. 76-3221 (D.C.Ga., 1976, 14 FEP Cases 492).

⁴⁴Support for guidelines is far from universal, however. See argument against the desirability or feasibility of federal guidelines presented by Ben Fischer, United Steelworkers of America, in "Seniority Is Healthy," IRRA 1976 Spring Meeting, *Labor Law Journal* (August 1976), pp. 497-503.

⁴⁵*Last Hired, First Fired: Layoffs and Civil Rights*, U.S. Commission on Civil Rights (Washington, D.C.: 1977), p. 63.

V.

Layoff-Seniority Cases in the Public Sector

The seniority principles discussed in the preceding chapter grew out of private sector employment situations which are not necessarily paralleled in public employment. The political exigencies of taxpayers' concern for the state of the public budget and of community pressure for racial, ethnic, and sex balance in the public work force, for example, tend to complicate the decision-making process that leads to a reduction in force. A discussion of public sector cases illustrates, however, that the principles created in a private sector context are equally applicable and that the differences in the nature of public and private employment relationships have little bearing on the way courts determine liability of government employers. Likewise, although public jurisdictions across the nation present a variety of employment systems, ranging from political patronage, to strictly administered merit systems, to civil service modified by collective bargaining, and gradations in between, the liabilities and duties emanating from Title VII apply in much the same way regardless of the source of the rules by which the employer selects or lays off employees.¹

The three public sector cases to be discussed in this chapter arose in Detroit and New York, cities plagued by financial difficulties which have been met in part by layoffs of public employees. (New York City—*Chance v. Board of Examiners*² and *Acha v. Beame*;³ and Detroit—*Schaefer v. Tannian*.⁴)

Layoffs by Racial Quota: New York

In the earliest of these cases, *Chance v. Board of Examiners*,⁵ the Second Circuit Court of Appeals ruled that layoff by seniority is not discriminatory even though it disproportionately affects minority group employees. The court found that the district court's order to lay off by racial quotas, so that minority-white ratios would be maintained, constituted unlawful preferential treatment.

The case did not develop out of actual layoffs, but rather out of a lengthy litigation begun in 1970 which sought to correct the underrepresentation of blacks and Puerto Ricans in supervisory positions in New York City's public schools. Disagreement developed over how to measure seniority for minority employees recently placed in supervisory positions in the rather likely event that the city would have to reduce personnel in the schools. The district court, exercising its jurisdiction over the various modifications in employment rules, approved a rule that would impose layoffs, or "excessing" as it is termed in that system, by ratio. Three seniority lists were to be kept and no person from either the black or Puerto Rican list could be laid off in any one district unless the percentage of the group in that district exceeded the percentage of the employees of the same group in the citywide school system. The result would be that white employees with greater seniority as supervisors could be laid off before junior minority employees in order to maintain these ratios.

In rejecting the district court's layoff plan, the court of appeals followed its sister appellate courts' rulings in *Waters*, *Watkins*, and *Jersey Central* and ruled that neither Title VII nor Sec. 1981 require "a senior, experienced white member of such a group to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contract...." To lay off in such a manner would amount to "constitutionally forbidden reverse discrimination."⁶

Although rejecting this wholesale modification of the seniority system, the court anticipated the Supreme Court's holding in *Franks v. Bowman* (issued two months later) by indicating that an individual employee, denied promotion because of a test since invalidated as discriminatory, could be awarded constructive seniority to restore him to his rightful place. The court placed its stamp of approval on the education board's offer to grant such employees a fictional date of employment which would be the mean (average) appointment date of those people who did pass the examination.

A lengthy dissent by one of the panel of three judges argued that, although the constructive seniority remedy is adequate relief for individuals who took the exam, the layoff quota was an attempt by the district court "to do rough justice" for those plaintiffs who did not apply for promotion "because they reasonably believed the supervisory examination to be discriminatory." The dissenter found that this form of remedial relief would be constitutionally permissible and not unlawful reverse discrimination, as it would be an approximate method of redressing past discrimination in a way that would benefit those who had been discriminated against only at the expense of those who had gained undue advantage by the discrimination. The dissent notes that Sec. 703(h) presents a stronger bar against this remedy than does the constitutional argument against reverse discrimination. Nonetheless, he concluded that the section does not preclude altering seniority to remedy an unlawful employment practice other than the seniority system itself, as was recognized in the departmental seniority cases. The dissent's theory of appropriate relief for a class *assumed* to have suffered discrimination is substantially similar to that approved by the U.S. Supreme Court the following year in *Teamsters v. U.S.*, as described in the previous chapter.

Constructive Seniority for New Female Police Officers: New York

One month after the *Chance* decision, the same circuit court ruled in *Acha v. Beame* that if an employee can show that she would have been hired early enough to have accumulated sufficient seniority to withstand layoffs but for the employer's discriminatory hiring practices, then her layoff violates Title VII. In so holding the court also correctly anticipated the *Franks* ruling.

Acha deals with female police officers in a fact situation that is of interest to local government employers because of the widespread, traditional segregation by sex of police departments. Before 1973, New York hired females only as "policewomen" for which there was a quota of 1.34 per cent of the total police force, making the male-female ratio 26,000-355 at the end of 1972. After 1973, the sex classifications were merged into one classification of "police officer" with a single entrance test, but hiring continued to be based on a sex quota, four men being hired for every one woman. The number of females under this plan (the propriety of which was not being challenged) had increased to 2.62 per cent of the force when, in June 1975, New York's financial crisis resulted in the layoff of 4,000 police officers.

The recent proportionate increase in the number of women meant that a comparatively greater percentage of women had lower seniority than did men. Thus, by operation of the city's facially neutral seniority rule, 73.5 per cent of the females on the force were laid off as compared to 23.9 per cent of the males. The district court judge, relying on *Waters* and *Jersey Central*, found that Sec. 703(h) permitted the city to apply its seniority rule and that to do otherwise would constitute unlawful preferential treatment on the basis of sex.

The appellate court rejected that reasoning, relying on *Chance* and a departmental seniority case decided by that court in 1971 (*U.S. v. Bethlehem Steel* 446 F.2d 652). Had *Franks* preceded this decision, the court's task of fashioning a remedy would have been vastly simplified.

The court limits relief, as did its brethren in *Chance*, to only those individuals who "themselves were the victims of discrimination by the [city]." In outlining the kind of proof the district court might consider adequate in making individual determinations of discrimination, the court suggests that the individual show she had filed an application, written a letter complaining about the hiring policy, or "expressed a desire to enlist," but was "deterred" by the city's known discriminatory practices.⁷ This panel of judges failed to pick up on the "rough justice" concept expounded by the dissent in *Chance*; however, the last category would allow relief for a discouraged applicant and also anticipated the broader definition of discriminatees allowed by the Supreme Court in *Teamsters*, although falling short of including minorities in the community who might be assumed to have become discouraged by the employer's hiring practices, but could not show proof of "expressions" of interest in applying.

Seniority Versus Court-Ordered Integration: Detroit

The Detroit situation presents a classic public sector case, and a detailed discussion of the facts may provide insight to public sector practitioners who face similar financial stringencies requiring cutbacks in affirmative action activities. The case was generated by a fact situation similar to that in *Acha*—a massive layoff of police officers with an adverse impact on females only recently integrated into a single police officer class.

On July 1, 1976, the city laid off 1,280 employees, of whom 600 were police officers. The layoff affected females more adversely than minorities or males among both sworn and non-sworn personnel. Layoffs were by seniority within each classification; no attempt was made to alter the seniority system to ease the impact as the civil service seniority rule is incorporated into three-year collective bargaining agreements that all had one year to run. Neither the unions nor the city moved to reopen the agreements to modify the rule. Although the city reportedly has expressed interest in modifying seniority to facilitate affirmative action hiring goals in the next round of negotiations, the city's affirmative action officer anticipates that the employee organizations would prefer to maintain the seniority principle.⁸

The only complaints of discrimination came from the police department where the impact was significantly greater for females because a recent court-ordered increase in hiring of females left them with less employment seniority than males, an example of the classical dilemma—court-mandated affirmative action versus negotiated seniority.

Pursuant to a suit filed in 1973, the city had modified its hiring practices which were found to discriminate against women: higher threshold requirements for women; entrance exams given for women annually but for men weekly; and, until 1970, women only eligible for a

women and children's section, thereby limiting the number of vacancies as well as the number of sergeant positions available to women.⁹ Under the court-mandated new hiring rules, in six months time 100 women were hired and 18 promoted. The women sought an injunction to halt the layoffs, and the district court found that the 100 new hires were to be laid off and all 18 promoted officers were to be demoted by operation of the negotiated seniority system. The percentage of women in the force had increased from 2 per cent to 6 per cent under the affirmative action edict, but the layoff would return the department to the same comparative composition that had existed before the remedial action had begun.

The district court enjoined the layoffs and demotions. It found the demotion question analogous to that in the departmental seniority case, *Local 189 Papermakers*. The negotiated seniority rule provided that officers would be laid off or demoted based on their seniority in rank. The newly promoted women with longer service in the police department had less seniority in the rank of sergeant than men because, prior to the court decree, they had been eligible only for promotions in the segregated women's department. "When the two lines [of progression] were merged, the women, by virtue of the past discrimination, had already been denied the only qualification which would have enabled them to withstand the planned demotions—time in rank. Thus, ...the seniority system whereby persons were selected for demotion is not a bona fide seniority system covered by Sec. 703(h) because it perpetuates the effects of past discrimination...."¹⁰

Turning to the layoff issue, the trial court anticipated the Supreme Court's ruling in *Franks* when it flatly rejected the contention that an employment seniority system is bona fide regardless of evidence of past employment discrimination. Accordingly, the district court enjoined the layoff of female police officers on the ground that the seniority system was not bona fide because it perpetuated the effects of past discrimination against women hired under the court-ordered modifications, all of whom had applied but been rejected for discriminatory reasons after the date of the act.

The police officers' association appealed to the Sixth Circuit Court of Appeals, claiming that the injunction violated a bona fide seniority system, but the appellate court affirmed the order in light of the Supreme Court's ruling in *Franks*, issued while the appeal was pending. Noting that *Franks* "appears to require individual determinations as to the remedial seniority status to be accorded to victims of discriminatory hiring practices," the court remanded the case to the district court.¹¹ The district court then dissolved the injunction while awarding retroactive seniority based on the date of first application, conditioned on whether that application would have been accepted under male requirements.¹²

The two basic fact situations presented in these public sector cases are repeated in many public jurisdictions which seek to improve their equal employment image. After an increase of minorities and women in supervisory or management positions, a reduction in force may result in demotion back to rank-and-file positions. Layoffs may reduce or eliminate progress made toward integration of traditionally segregated professions, such as law enforcement or firefighting, where women have been categorically excluded and men of certain racial or ethnic backgrounds have been excluded by operation of tests or physical requirements which favor male caucasians but which are insufficiently job-related to be valid under equal opportunity standards.¹³ By the same token, there are many additional potential equal opportunity conflicts to which the principles set forth in these cases could be applied.

¹A recent district court case held a California city liable for discriminatory hiring despite the defense raised that the hiring was done according to a "bona fide merit system" exempted from liability by Sec. 703(h). The opinion stated that a system "which relies on discriminatory devices not based on a business necessity is not a 'bona fide' 'merit' system" within the meaning of the act. The merit system rules in question were height requirements for firefighters. *League of United Latin American Citizens v. City of Santa Ana* 12 FEP Cases 651, at fn. 28 (C.D. Cal., 1976).

²534 F.2d 993 and 1006, 11 FEP Cases 1450 (2nd Cir., 1976).

³531 F.2d 648, 12 FEP Cases 257 (2nd Cir., 1976).

⁴394 F. Supp. 1136, 10 FEP Cases 897 (E.D.Mich., 1975).

⁵Termed "*Chance IV*" to distinguish it from other decisions in the same litigation, all of which bear the same case name.

⁶534 F.2d 993, 998, 11 FEP Cases 1450, 1454.

⁷On remand, the district court approved a class action, consisting of 369 female police officers laid off, and appointed a master to determine whether the individual members of the class could present proof sufficient to meet the test set forth to qualify for constructive seniority. The court also granted immediate seniority rights, and thereby a place on the reinstatement list, to 38 women who had scored sufficiently high on a 1969 exam to have been hired in 1970 but for the city's unlawful practice. See district court opinion, *Acha v. Beame* 13 FEP Cases 16 (S.D.N.Y., 1976).

⁸Telephone interview with Frank Smith, Coordinator, Affirmative Action Unit, City of Detroit Personnel Department, September 22, 1976.

⁹A more detailed discussion of the discriminatory practices may be found in *Schaefer v. Tannian*, 394 F. Supp. 1128, 8 FEP Cases 12 (E.D.Mich., 1974).

¹⁰394 F. Supp. 1136, 1142, 10 FEP Cases 897, 903.

¹¹*Schaefer v. Tannian* 538 F.2d 1234, 13 FEP Cases 528 (6th Cir., 1976).

¹²District court action confirmed by William B. Beach, Assistant Corporation Counsel, City of Detroit, October 4, 1976. Another aspect of the case, only tangentially connected with the seniority-affirmative action problem, deals with employees paid with federal funds under the Comprehensive Employment Training Act. In Detroit, all employees, whether paid by federal or city funds, have the same seniority status. All the females in the police department were paid by CETA funds, as were many males. Detroit reportedly views the availability of these funds as an aid to realizing its federally mandated equal employment opportunity goals. Many CETA employees were laid off solely because of the seniority rule. Therefore, the district court enjoined the layoff of both male and female CETA-paid officers in an effort to reduce the numbers laid off and to lessen the detrimental effect on male officers while, at the same time, according relief to female victims of discrimination. The appellate court reversed the order enjoining layoff of males because no discrimination was alleged or found to exist against males and hence the court had no basis for its injunction. 13 FEP Cases 528, 529.

¹³See *Davis v. County of Los Angeles*, 13 FEP Cases 1217 (9th Cir., October 20, 1976).

VI.

The California Experience: A Case Study

The potential for conflict remains between the effectuation of the seniority principle and the maintenance of affirmative action gains even though the case law has answered several questions concerning the extent to which seniority systems are immune from charges of discrimination. Public employers may be faced with the need to formulate plans for reductions in force without producing a disparate impact on the minority or female employee population, not only to avoid possible Title VII liability but also to realize the public policy goal of integrating the public work force.

Although seniority is not yet a universal rule in the public sector, many jurisdictions incorporate the principle in layoffs either by regulation or negotiated agreement. If layoffs are conducted according to contract provisions, unions may share the liability for any resulting discrimination (illustrated by the presence of unions as named parties in the litigation discussed in the foregoing chapters). Unions have been held equally liable with the employer for negotiating an overtly discriminatory contract clause,¹ wholly liable for being the principal instigator of a discriminatory provision,² and also liable for a contract clause, facially neutral, that perpetuates the employer's pre-act discrimination.³

10 California Jurisdictions

In the late summer and fall of 1976, several California local government jurisdictions, known to have faced actual or potential reductions in workforce, were contacted to determine how the practitioners were approaching the layoff problem, whether an impact had been seen or anticipated on their affirmative action gains, and whether the employer was seeking a means of avoiding any possible conflict between the legal duty to avoid discrimination and the equally pressing obligation to respect seniority rights of employees.

Table 1 sets forth several pertinent facts about 10 of these California jurisdictions, including the extent of layoffs, the nature of layoff rules, and some characteristics of the responses to the layoff-affirmative action conflict.

Layoffs Without Reductions

All these public employers implemented a reduction in force, but not all did so by layoffs. Only the City of Compton and Berkeley Unified School District had significant layoffs in proportion to their work forces. Most found alternative means short of laying off employees; for example, Sacramento cut about 120 positions, but let go no career employees as the cut was absorbed by transfers and attrition. A major reduction in Sacramento's street maintenance personnel was absorbed by the creation of a "mobile work force," which provided short-term ser-

vices to various city departments which otherwise would have had to hire temporary help. Even those jurisdictions that had major layoffs, like Los Angeles County, reduced the numbers greatly by transferring and demoting people to appropriate vacancies.

In all 10 jurisdictions, employee organizations worked actively with management to minimize layoffs, Santa Clara County providing an interesting example of a cooperatively designed alternative means of reducing the working force. The county and all recognized organizations agreed to a form of work sharing in a "voluntary reduced hours program" which allowed employees to opt for a 5, 10, or 20 per cent reduction in salary for an equal reduction in hours for the remainder of the fiscal year. The county had originally proposed a compulsory shorter work week or layoffs of several hundred employees. Two Service Employees International Union locals campaigned to oppose this, suggesting several measures, including voluntary reduced hours. An intensive review of the county's budget, nonpersonnel cuts and adjustments, and unanticipated savings ultimately resulted in the county determining that no personnel cuts would be necessary, and, in fact, a preexisting hiring freeze was lifted. During earlier contract talks, SEIU had advocated the work-sharing plan as a negotiated benefit, but the county was not receptive to the concept until viewed as an alternative to layoffs. About 1,100 employees volunteered for the plan, and the county indicated that this was one of the factors which led to cancellation of layoff plans.⁴

Impact of Layoffs on Minority Employees

The alternatives to layoff utilized by these California jurisdictions were not sought in order to avoid an adverse impact on minorities or women, but rather simply to avoid layoffs. Only one jurisdiction indicated that an adverse impact on minorities had actually occurred, and not all the agency spokesmen appeared to be concerned about a potential adverse impact. Most indicated that such a problem would only occur if layoffs were imposed in massive proportions and that such a dramatic reduction was not foreseen.

The Berkeley Unified School District was the one jurisdiction that reported an adverse impact on minority group employees. The discrimination issue was highlighted during the time teacher layoffs were being contested and ultimately imposed, and the filing of individual discrimination complaints was anticipated. Layoffs were by strict seniority in accordance with a state tenure statute which makes no allowance for particular abilities of employees or other special considerations, such as affirmative action.⁵ For example, a black counselor, seen as vital to maintaining rapport with black students, could not be retained over a white counselor with greater seniority, nor could any teacher with a special teaching skill be retained so long as a more senior teacher was generally "certified and competent" to teach that subject.

In Berkeley, approximately 65 per cent of the 122 teachers originally laid off were from minority groups, and that ratio remained when nearly two-thirds of the 122 were reinstated after the district's enrollment and budget were finalized. The percentage of racial or ethnic minority teachers in the district was reduced from 39 per cent to 37 per cent by the layoffs, compared to a minority student enrollment of 55 per cent. Both teacher organizations actively opposed the layoffs, attacking the school board for the financial difficulties of the district and offering suggestions for altering spending without laying off instructors. However, both groups supported the concept of layoffs by strict seniority and succeeded through administrative hearings to invalidate 58 of the 180 originally proposed layoffs. The state statute requires economic layoffs to be by se-

niority unless a particular program is eliminated, and then employees in that program go without regard to seniority standing with the rest of the faculty. The school board had sought some flexibility in the layoffs by eliminating some positions in the form of "program cuts" in order to avoid layoffs in other positions considered to be more vital to the system. But these "program cuts" were found to be not bona fide by a hearing officer.⁶

Alteration of Layoff Rules

Unlike local government jurisdictions where the seniority system is within the control of the local agency or its civil service board, neither the Berkeley School District nor the employee organizations was in a position to seek an alternative to seniority. The school board did support unsuccessful legislative attempts to alter the statute; these attempts were made by several major school districts and were opposed by both the California Federation of Teachers (AFL-CIO) and the California Teachers Association (NEA).

The initial legislative proposal was to amend the seniority rule to allow the local school board to make exceptions to maintain affirmative action gains and instructional programs.⁷ The employee organizations successfully blocked this erosion of the seniority rule, claiming the employers were not concerned with affirmative action but rather with using that ruse to eliminate the statutory protections which prevent subjective or discriminatory selections for layoffs. A substitute measure⁸ was introduced to make seniority a subject of collective bargaining within the scope of bargaining set forth in the new school negotiations act.⁹ But that bill was not passed in the 1976 session owing to disagreement among the two teacher organizations and the schools over whether any change in the statute was desirable and, assuming it was, what rule should govern should no agreement be reached in a local district. The affirmative action aspect of the original proposal was eliminated, and the issue became one of local determination of seniority through collective bargaining.

The issue promises to remain alive as public schools are affected with a different, and probably more severe, budgetary problem than other California jurisdictions in that their ability to tax is based on enrollment. If enrollment drops, which has been the case in recent years owing to a number of social factors, then the budget must drop accordingly. However, an enrollment drop does not necessarily mean that an equivalent percentage of personnel can be eliminated and still maintain the instructional program or level of educational services. The school boards therefore are seeking greater flexibility in layoff rules to enable them to minimize the impact on quality of educational programs. Teachers, on the other hand, threatened with ever-increasing job insecurity as enrollments continue the downward trend, are more than ever concerned that layoffs be governed by objectiveness in the form of length of service, and not the employer's opinion of value or merit. Both sides also voice concern for protecting affirmative action gains, but with less stridency than that provoked by the other issues.

Other jurisdictions gave varying degrees of attention to the conflict between seniority and affirmative action. In both the City of Palo Alto and Santa Clara County, management negotiators reported that a proposal to incorporate affirmative action considerations into layoff criteria met with a negative response from the recognized employee representatives, and the subject never went beyond preliminary discussions. Santa Clara County indicated that it was difficult to press the issue because of the courts' refusal, as expressed in the *Jersey Central* case, to find that Title VII requires seniority systems to accommodate to affirmative action plans.

Table 1
 Layoffs and the Seniority-Affirmative Action Conflict:
 10 California Public Employers' Responses, 1976

Agency	Extent of Layoffs		Layoff Criteria				Layoff Rules		Alternatives to Layoff			Adverse Impact on AA Gain	Attempts to Modify Layoff Rules to Protect AA Gains
	Number of Layoffs	Total Workforce (FTE)	Strict Seniority	Seniority & Other Factors	Equal Ability Then Seniority	Ability or Management Discretion	CSC Rule	Contract	Hiring Freeze/Attrition	Transfer/Attrition	Work Sharing		
Alameda County	n ¹	8000	no	no	no	yes	no	no	yes			no	yes
Berkeley Unified School Dist.	50 ²	1,000	yes	no	no	no	— ³	no	yes			yes	yes
Compton	60	550	yes	no	no	no	yes	no	yes			no	no
Los Angeles	30	45,000	yes	no	no	no	yes	no	yes	yes		no	no
Los Angeles County	350 ⁴	82,000	yes	no	no	no	yes	no				no ⁴	no
Monterey County	12	2,700	no	no	yes	no	no	yes		yes		no	yes ⁵

Palo Alto	n ¹	750	no	yes	no	no	no	yes		yes		no	yes
Sacramento	n ¹	2,700	no	yes	no	no	yes	no		yes	yes ⁶		yes
San Mateo County	30	4,200	yes	no	no	no	yes	yes	yes			no	yes
Santa Clara County	n ¹	9,000	yes	no	no	no	no	yes	yes		yes ⁷	no	yes

¹ n = negligible number or no career employees.

² Original layoff notices: 180, 122 laid off, 72 reinstated before school began in Sept. 1976.

³ In state tenure statute, Education Code Sec. 13447.

⁴ Layoffs in progress, no ethnic, racial, or sex data available. Further transfers, demotions, and possible layoffs expected.

⁵ Consent decree imposing affirmative action plan imposes new seniority rule. (Discussed in text.)

⁶ Consolidation of casual, short-term hiring into "mobile work force" of career employees. (Discussed in text.)

⁷ Voluntary reduction in hours. (Discussed in text.)

The City of Sacramento took a unique position on this potential conflict. Before any layoffs had been ordered, but with a likelihood of cuts being imposed in the upcoming budget, the personnel manager proposed extensive revision in the civil service layoff provisions, which would include protection of the hiring gains made by minorities and women through the affirmative action program. The proposed rule would establish separate seniority lists of affirmative action hirees and require that no person on the lists could be laid off if doing so would reduce the percentage of minority or women employees in a classification.

The union representing a majority of city employees obtained a court order halting adoption of the rules because the city had failed to negotiate as mandated by state employee-employer relations statute¹⁰ and the city's employee relations ordinance. The city contended that the matter was exempt from the duty to bargain because the rules were issued by the civil service board rather than the city council. The trial court indicated that the board might be obligated to bargain, but avoided ruling on that controversial issue by finding that layoff rules were under the city council's jurisdiction and therefore the council must bargain on them before adopting them. The union position in the mandated negotiations was for strict seniority with no special affirmative action protections.

Union Attitudes Toward the Seniority-Equal Opportunity Conflict

The Sacramento union's attitude toward this issue is exemplary of most employee organizations. In all of the jurisdictions discussed here, the organizations took strong positions against any layoffs; most expressed concern for protecting the jobs of minorities and women, but not at the expense of other employees with longer service—who include minorities and women—and whose job rights the organizations are pledged to protect. Many of the organizations did not rest on this defensive position, but acted aggressively in insisting on participation in the managerial decisions on how budget reductions could be absorbed with minimal layoffs.

The dilemma of employee organizations in this conflict is keenly illustrated by an occurrence at the American Federation of Teachers' national convention in 1976. The convention adopted a seniority resolution which stated that seniority was a "central feature of an equitable, effective system of labor-management relations" and reaffirmed the union's commitment to the seniority principle despite the recent attacks stemming from the adverse impact on members of ethnic, racial, or sex groups. A floor amendment was offered which stated that management should not be allowed to use seniority to destroy the gains of affirmative action and that "seniority must be construed in collective bargaining agreements to make it possible to carry out the objectives of both affirmative action programs and seniority principles to the fullest extent possible."

Following a brief but emphatic floor debate, the amendment was voted down. However, the resolution adopted acknowledged the problem and set forth a number of proposals for dealing with layoffs which included: senior employees should not be asked to "bear the burden of layoffs" so that "newer employees can be retained," but employees who can prove that they experienced discrimination in hiring should be awarded their rightful place in the seniority structure (an affirmation of the *Franks* rule). The resolution, offered by the union's executive council, suggests that the focus should be on a full-employment economy to avoid the conflict and not on whether seniority systems adversely impact on minority employees.¹¹

Organized labor has maintained its emphatic defense of seniority and expounds the view that the denial of job security for incumbent workers does not enhance the federal policy of achieving equal opportunity for all. The AFL-CIO reiterated this position in response to the U.S. Civil Rights Commission's call for modification of seniority rights to accommodate affirmative action goals: "The schemes proposed [by the Commission]...in the name of 'affirmative action,' add up merely to negative action and institutionalized discrimination against workers who have by long and faithful service earned the right to job security." Congress recognized this position, according to the AFL-CIO, when it enacted Sec. 703(h) of Title VII to protect seniority systems that otherwise might have been felled by Title VII's proscription of discriminatory employment practices.¹²

At least one civil rights group, the A. Philip Randolph Institute, which is closely associated with the labor movement, has come to the defense of seniority, noting that the system operates to defend minority workers against discriminatory treatment and that doing away with it would not end unemployment or the regrettable social condition of minorities that has resulted from discrimination in hiring practices.¹³

One exception to the union preference for strict seniority that occurred in the California jurisdictions studied was in Alameda County where a bargaining representative of the SEIU locals suggested incorporating affirmative action into layoff criteria. The county did not agree to that or any other suggested layoff criteria, asserting its position that the size and composition of the work force is a management prerogative. Neither the civil service rules nor negotiated agreements set forth any specific layoff criteria, and the county agreed to a severance pay provision for laid-off employees rather than agreeing to union input into the layoff process.

Seniority Conflicts With Affirmative Action Plans

None of the layoffs in these jurisdictions has yet resulted in formal complaints of discrimination. Even in the Berkeley schools, the adverse impact was not of the proportions of that in the Detroit or New York police departments. Some jurisdictions, like the City of Compton and Los Angeles County, noted that their longstanding practice of hiring a high percentage of minority persons should mean that a layoff by seniority would have no disparate effect. Even such jurisdictions acknowledged, however, that a problem could occur with only a moderate layoff in a target affirmative action area, such as law enforcement, professional, or mid-management positions, where minorities and women have just begun to gain in numbers. In some areas, although blacks have not been underrepresented in recent years, Spanish-surname and Asian people have yet to reach par with the local labor market or community population. Women are also notably absent in some professions, such as firefighting.

Litigation raising the issue of the impact of traditional seniority layoff rules on affirmative action programs occurred in two California jurisdictions in 1976. Neither arose in a layoff situation. The first involved a consent decree stemming from discrimination charges filed in 1973 against the County of Monterey. The county denied any discriminatory personnel practices, but consented to a decree setting forth an affirmative action plan to improve employment opportunities for all minority group persons.

Included in this decree is a clause governing reductions in hours and layoffs which specifies that "no seniority system, whether formal or informal, shall be used by the County in effect-

ing personnel actions where such seniority system serves to perpetuate past discrimination or has a disparate impact on an underrepresented minority group."¹⁴ The plan includes goals and timetables for achieving ethnic and racial balance and presumably a layoff involving minority persons that adversely affected the achievement of those goals would violate the phrase concerning "disparate impact."

The county has a negotiated seniority provision which allows the county sole discretion to determine whether competing individuals are equal in ability, and only then does seniority apply.¹⁵ The consent decree apparently adds an affirmative action consideration to the operation of that negotiated provision, leaving seniority as the last criterion to be considered in layoffs. The consent decree could be challenged, however, as conflicting with the terms of the labor contract, which plainly limits layoff criteria to ability, qualifications, and seniority. The issue was raised in the *Jersey Central* case, discussed above, but that case does not indicate whether court-ordered affirmative action or the negotiated contract should prevail. The decree in *Jersey Central* did not conflict with the contract which did not specify layoff procedures, as does the Monterey County decree.

The second case arose in the City of Richmond in a demotion, rather than a layoff, situation. A police captain returned from leave to active duty, causing the demotion of another captain by operation of the seniority rule. Although the main thrust of the ensuing litigation was that the seniority rule had not been accurately applied, the employee also asserted that his demotion violated the city's affirmative action policy. The employee was Spanish-surnamed, and his demotion left the department with no minority upper-rank officers in a city with a very substantial black and Latino population. The affirmative action issue was raised in an administrative hearing before the city personnel board, the body which has policy responsibility for affirmative action as well as for personnel decisions, but the board deadlocked and made no recommendation. The affirmative action complaint, which was based on the intent of the city's policy and not on violation of state or federal laws, became only a peripheral issue in the court suit which followed.¹⁶ However, the case demonstrates that the issue can be raised with a very slight reduction in personnel that may not require layoffs.

One of the primary goals of an overall affirmative action program is training and promotion of minority or female employees to better paying and managerial positions, a goal that also can suffer from a reduction in force. Although most of the seniority rules in these jurisdictions calculate seniority by total employment with the agency, some count time in a department or, particularly in law enforcement, time in rank or classification. Such a rule caused the demotion of the police officer in Richmond because he had less time in the higher rank, although more total service in the police department, than the employee who displaced him. Secondly, many seniority rules allow a senior employee whose position has been cut to bump a more junior employee in a lower classification in the same promotional ladder, causing a domino effect of demotions. Even though no one may be laid off, an adverse impact may occur on this important aspect of an affirmative action program. Although the layoff alternatives used in these jurisdictions often included demotions, no adverse impact stemming from the demotion of recently promoted women or minority group employees was acknowledged.

Political Effects of Minority Layoffs

Layoffs that affect minority personnel may have negative ramifications even if the jurisdiction's overall minority employee population remains in line with that of the community or of

the local labor market, for a public employer may have to respond more to the political and policy aspects of the problem than to legal liability for discrimination. The Los Angeles County layoffs produced such a situation although no significant impact was made on the ethnic, racial, or sex composition of county employment (the initial wave of layoffs constituted less than 1 per cent of the work force).

The county had employed a number of "community workers" in the probation department, most of whom were from racial or ethnic minority background, drawn directly from the community without formal training to provide individual liaison between the probation officers and the poverty community. In the initial layoff in the fall of 1976, all 126 of these employees were given notice, which met with strong union opposition owing not only to their uniquely valuable services but also to the impact on them as individuals. They had begun a new professional career without traditional education, and, therefore, layoff or transfer meant reduction in prestige and professional standing as well as pay. Ultimately only 18 were let go, although the future remained uncertain as the county continued to implement cuts and began studying the prospect of cutting 6,000 more jobs over the next three years.¹⁷

¹ *Taylor v. Goodyear Tire and Rubber Co.*, 6 FEP Cases 50 (N.D. Ala., 1972).

² *Guerra v. Manchester Terminal Corp.*, 402 F.2d 641, 8 FEP Cases 433 (5th Cir., 1974).

³ *Myers v. Gilman Paper Corp.*, 392 F. Supp. 413, 10 FEP Cases 220 (S.D.Ga., 1975).

⁴ The significance of the plan as a money-saving device is disputed. The unions claim layoffs were averted by corrections in the county's budgetary processes and that savings from the work-sharing plan were insignificant in comparison. The unions urged employees not to volunteer in order to avert layoffs, but only if the plan would benefit the individual's personal interests. See *California Public Employee Relations*, No. 31 (December 1976), p. 71.

⁵ California Education Code, Sec. 13447.

⁶ Layoff controversy described in *CPER* No. 30 (September 1976), p. 75. Subsequently the school board decided to invite a legal test by rehiring a black counselor out of seniority order (see *CPER* No. 32 [March 1977], p. 58).

⁷ A.B. 2284 (Arnett) 1975.

⁸ A.B. 2910 (Arnett) 1976.

⁹ Rodda Act, California Government Code Sec. 3540 et seq.

¹⁰ Meyers-Milias-Brown Act, California Government Code Sec. 3500 et seq.

¹¹ Resolution No. 57, American Federation of Teachers Convention, August 16-20, 1976, Miami, Florida. Convention Minutes, pp. 18-20.

¹²AFL-CIO statement reprinted in *Daily Labor Report* No. 40 (February 28, 1977) A4. The "union attitude" toward seniority and the conflicts engendered by layoffs and affirmative action responsibilities is eloquently stated in a paper presented at the 1975 New York University Conference on Labor: James E. Youngdahl, "How Can Seniority, Anti-Discrimination and Affirmative Action be Reconciled in a Layoff Economy: The Union Viewpoint" in Conference on Labor, New York University *Proceedings*, No. 28 (New York: Matthew Bender, 1976) pp. 297-316.

¹³Bayard Rustin and Norman Hill, *Seniority and Racial Progress* (New York, A. Philip Randolph Institute, 1976[?]), p. 3.

¹⁴Paragraph VII, Consent Decree, *Hisuaro Garza, et al., v. County of Monterey, et al.*, N.D. Ca., No. C-73-2074 RFP (SJ). Approved December 3, 1976, U.S. District Judge Robert Peckham.

¹⁵Memorandum of Agreement between the Monterey County Employees' Association and the County of Monterey, 1974-77, Sec. 20:0.

¹⁶*Ceballos and Freitas v. City of Richmond, et al.*, Contra Costa County Sup. Ct. No. 168-125. (Case dismissed February 1977.)

¹⁷See *CPER* No. 31 (December 1976), pp. 68-9.

VII.

Alternatives to Conflict

Affirmative action or seniority? The concerns of both public sector managers and employee organizations in a layoff situation appear to lead them away from allegiance to affirmative action gains. However, experience in the California jurisdictions studied indicates that the ultimate decision to lay off, and therefore the potential conflict, may be avoided by the use of alternative approaches to personnel cost-cutting. Alternatives also exist to layoff by seniority, and innovative cooperation between management and employee representatives may create the means of easing the impact on affirmative action gains.

The courts and critical commentators have viewed the dilemma in recent years in the context of private sector layoffs and have presented an array of alternatives designed to minimize the adverse impact on persons protected by Title VII.¹ A review of some of these suggestions presents a provocative choice of methods available to managers and unions to respond to the interests of their constituencies—taxpayers and union members—and still protect the minority and women employees whose improved status in the public labor market is also a vital concern of both managers and employee organizations.

The court decisions have been focused on layoffs by seniority after the fact, and whether or not the employer or union has violated Title VII. But private sector layoffs occur in a somewhat different manner—when production cuts are determined, production workers must go. In contrast, the relatively static nature of employment in service industries, reflected in less dramatic increases in unemployment rates during the recent recession, is especially manifested in government employment. Drops in revenue, caused by declining tax rates or cutting of state or federal subsidies, are generally projected into the future sufficiently to give public managers an opportunity to plan ahead how to absorb cuts with minimal personnel impact. The California experience indicates that public employers are quite interested in avoiding layoffs and have utilized several of the following suggested cost-cutting concepts to that end.

Suggested personnel cost-saving devices, short of personnel reduction, include payless vacations and holidays; payless workdays;² waiver of employer contribution to fringe benefits; early retirement; elimination of overtime; temporary leave without pay for employees to pursue travel, educational or other personal interests; scrutiny of vacancies and filling of only those determined to be necessary to the service; and a general hiring freeze in which no new positions are created and no vacancies filled, meeting service needs by transfers of qualified employees. The last two methods were most commonly used in the California jurisdictions surveyed.

If such cost-saving devices fail to meet the budget, a second stage of alternatives has been offered, methods that affect individual employment but stop short of actual layoffs. Most are "work-sharing" proposals that reduce the amount of work done and divide it among existing employees without putting anyone out of a job. Some of the above cost-saving suggestions are in fact work-sharing devices and are reiterated here: consolidation of temporary and part-time hiring

into a pool of full-time, permanent employees available to all agency departments;³ the restructuring of vacant jobs from full- to part-time positions; changing one full-time job into two half-time positions; reduced work week for reduced salary;⁴ short-term and intermittent shut down of some services; elimination of overtime; limiting of subcontracting so that work will be done by employees on the payroll; rotational layoffs so that each employee in a class has a turn at being temporarily off without pay; and voluntary leave without pay with the right to return to a vacant job or to bump a more junior employee.

If layoffs actually occur and the seniority system threatens to disadvantage minority or women employees disproportionately, critics of strict seniority have proposed a number of variations. Proponents of these departures from strict seniority note that many union contracts and personnel rules already allow inroads into the rule through "super-seniority" for union officials or persons of exceptional and vital skills⁵ and extra seniority credit for veterans. Among a number of seniority alternatives are: voluntary layoff; layoff by lottery; rotational layoffs; layoff by inverse seniority with the most senior employee off first and the employer paying the difference between his wage and the unemployment benefit received; layoff by chronological age which, much as seniority does, protects older employees with less job mobility; layoff by a rating system that incorporates such factors as age, marital status, dependents, physical fitness, qualifications, total employment experience, and seniority; and separate seniority rosters by sex and racial or ethnic grouping with layoff by quotas to maintain racial, sex, or ethnic balance.⁶

All of these proposals have been studied with interest by management and employee practitioners faced with the layoff-affirmative action dilemma. A survey of major collective bargaining agreements, negotiated before the 1974-1975 recession, found some provision for reducing the impact of layoffs in 20 per cent of the agreements through such methods as work sharing and restrictions on subcontracting and new hires.⁷

Many of these alternatives meet with criticism based on resistance of management, unions, and employees to erosion of vested interests in established methods of assigning work and reducing the work force. Also, many of the proposed plans produce particular complications in implementation that have drawn criticism. The literature referenced in this chapter provides thoughtful discussions of many of the perceived advantages and disadvantages.

Work sharing, as one example of a scheme which presents problems in implementation, does not neatly comport with unemployment insurance schemes, which were designed primarily to aid the totally unemployed. Although in California, as in most systems, an individual is entitled to unemployment benefits even if partially employed, the earnings received are deducted from the total weekly benefit and may render a person ineligible for any compensation if the earnings exceed the weekly benefit the person otherwise would be entitled to. As benefits tend to be lower than many workers' take-home pay (\$30 to \$104 a week), employees reduced to half-time through an imposed work-sharing program might not be eligible for any unemployment insurance compensation to offset the loss of income. Also, if two employees share one full-time job, the cost to the employer is higher in that he may be liable for contributions to unemployment insurance as well as to health and retirement plans for both workers.⁸

Unions have made seniority and job security a prime issue in bargaining and have appeared eager in the public sector in this state to work actively with managers to mitigate the impact of budget cuts on all employees. The shared duty under Title VII and other state and federal

nondiscrimination laws to work toward full employment status for minorities and women behooves unions and managers to use the collective bargaining forum creatively to meet the real and increasing problem of layoffs in public employment.

Rather than leaving the courts or legislature to impose a solution, the employers and representatives of affected employees can shape plans that minimize and also realize reductions in force in ways that protect both the legitimate interests of employees with seniority rights, maintain an adequate level of service to the public, and still insure to the fullest extent possible the participation in the public labor market of all persons regardless of sex, ethnic group, or race.

¹Layoff by seniority and Title VII is the subject of numerous articles. Among those suggesting alternatives, discussed in this chapter, are: Sara Behman, "The Affirmative Action Position," IRRA 1976 Spring Meeting, Session II, Affirmative Action v. Seniority, *Labor Law Journal* (August 1976), pp. 490-497; Blumrosen and Blumrosen, "The Duty to Plan for Fair Employment—Revisited: Work Sharing in Hard Times," 28 *Rutgers Law Review* (1975), 1082-1106; George Cooper and Richard B. Sobol, "Seniority and Testing Under Fair Employment Laws," *Harvard Law Review*, 82 (June 1969), 1598, at 1635 ff; "Reducing the Effects of Layoffs on Your Affirmative Action Program," *EEO for State and Local Governments*, U.S. Civil Service Commission, No. 15 (1976); Ellen R. Joseph, "Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy," *Columbia Journal of Law and Social Problems*, 11 (Spring 1975), 343-402; Lund, Bumstead, and Friedman, "Inverse Seniority: Timely Answer to the Layoff Dilemma?" *Harvard Business Review* (September-October 1975), 65-72; Caroline Poplin, "Fair Employment in a Depressed Economy: The Layoff Problem," *UCLA Law Review*, 23 (1975), 177-234; Summers and Love, "Work Sharing as an Alternative to Layoffs by Seniority: Title VII Remedies in Recession," *University of Pennsylvania Law Review*, 124 (April 1976) 893-941; and *Last Hired, First Fired: Layoffs and Civil Rights*, U.S. Commission on Civil Rights (Washington, D.C.: 1977) pp. 49-60.

²Reportedly used by the Detroit police department to end the affirmative action dispute over layoff of women and minority officers which had led to the *Schaefer v. Tannian* litigation discussed in Chapter V.

³Used in Sacramento in the creation of a "mobile work force," mentioned in Chapter VI.

⁴Implemented in Santa Clara County as the negotiated "voluntary reduced hours program," discussed in Chapter VI.

⁵The California state tenure statute has been construed to allow one exception to the strict seniority rule, and that is to permit bilingual teachers, teaching in a bilingual program, to be retained over more senior employees otherwise competent to teach the grade level.

⁶Sacramento formally considered such a proposal, and the same proposal is now the subject of collective bargaining, as discussed in Chapter VI.

⁷"Layoffs, Rehiring and Work Sharing," *Basic Patterns in Union Contracts* (Bureau of National Affairs) 60:5 (1976).

⁸See discussion of a New York City proposal for a 4-day week with unemployment compensation for the fifth day in *Last Hired, First Fired: Layoffs and Civil Rights*, U.S. Commission on Civil Rights (Washington, D.C.: 1977) p. 52.

VIII.

Conclusion: The Public Sector's Challenge

The courts, legislative bodies, public managers, employee organizations, the disadvantaged, and the public all have an interest and will have a voice in the resolution of the conflict between seniority and affirmative action in the public sector. On the surface, the issue does not appear significantly different from that developed in the private sector, but there are differences in the public sector in concerns, obligations, and expectations that create a unique forum for the legal and negotiated responses to conflict.

Public employees share their private sector counterparts' concern for recognition of the value of length of service. Public employees are likely to have heightened expectations stemming from the popular idea that job security is nearly synonymous with civil service employment and from the fact that public payrolls have been growing steadily for decades. Tenure in public education and civil service testing and disciplinary procedures have enhanced the sense of protection from arbitrary or capricious employment decisions.

This public sector attitude is grafted onto the strongly held concept of most workers that longevity in a job creates additional rights when reductions in force occur. Those that object to incorporation of the somewhat subjective criterion of ability into the order of layoff object even more to the seemingly irrelevant criterion of race or sex. Considerable emotion is present in the common question—why should an employee with long years of service, competence, and experience be required to step aside in favor of a minority or female worker with less or no time and experience? Public employees' particular expectations of fairness, objectivity, and security reinforce the general adverse reaction to bearing the brunt of righting social wrongs against the disadvantaged.

Public managers bear a burden unlike their private counterparts—they represent political entities and are expected to respond to the needs of all their constituency. That political need is the cause of the financial retrenchments that have led to layoffs and also is the cause of many of the problems the public employer faces in framing retrenchment plans. The public employer bears a responsibility to the taxpayers to avoid an onerous tax burden, a concern that has led many employers to reduce the public payroll rather than to increase the tax rate. At the same time, the employer must provide vital public services, such as quality education, adequate public transportation, aid to the needy, health and sanitation services, and safety protection which the public demands despite the need for fiscal restraint. When these policy concerns are translated into employment decisions, the public employer finds it difficult to make politically acceptable decisions that still respond to the issue of job security versus equal employment opportunity.

But the public employer also has a particular social and political responsibility to respond to the job needs of the disadvantaged, especially when viewed in terms of reducing severe unemployment. One court has recognized this special responsibility of the public employer: "[P]erhaps the most crucial consideration in our view is that this is not a private employer and not

simply an exercise in providing minorities with equal employment opportunity. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement."¹

Equities are on both sides of the conflict—the seniority principle's defense of the investment of one's labor and the equal opportunity principle's guarantee that no one may be deprived of the right to an equal investment of labor because of sex, race, or ethnicity. Congress attempted to resolve the conflict by enacting Title VII with protection for bona fide seniority systems contained in Sec. 703(h). The courts are defining the terms of that compromise as the act is applied to disputes engendered by the economic downturn. The special expectations and responsibilities of public employees and employers could shape a different response in the public sector in that the motivations of all concerned may be to seek mutually crafted alternatives to the conflict without resort to solutions imposed from outside the employer-employee relationship by litigation or legislation.

¹*NAACP v. Allen* 493 F.2d 614, 7 FEP Cases 873 (5th Cir., 1974).

**Also published by the California Public Employee Relations
Program of the Institute of Industrial Relations, Berkeley**

CPER—A journal-information service published regularly since 1969. *CPER* is widely recognized as the only comprehensive and objective authority in the field of California public sector employment relations.

Contents: in-depth news from all sections of California's public sector, continuing treatment of PERB actions, descriptive and analytical articles on issues of current importance, analyses of court decisions and statistical data, a log of neutrals' awards and recommendations, legislative updates, reports on major national events, and reprints of important documents.

Current subscribers: management and labor practitioners, elected officials, lawyers, judges, professional neutrals, journalists, academicians, students.

Price: six issues annually, with supplementary news releases.—\$50 a year

CPER INDEX—*CPER* is fully indexed, including a statutory index and table of cases. Issues 1–22, 1969–74 (154 pp.)—\$25; issues 23–27, 1974–75 (68 pp.)—\$5; issues 28–31, 1976, with annotated subject entries and complete index of neutrals' decisions (67 pp.)—\$7.50.

Discounts for multiple orders available.

CPER

Institute of Industrial Relations
University of California, Berkeley, CA 94720